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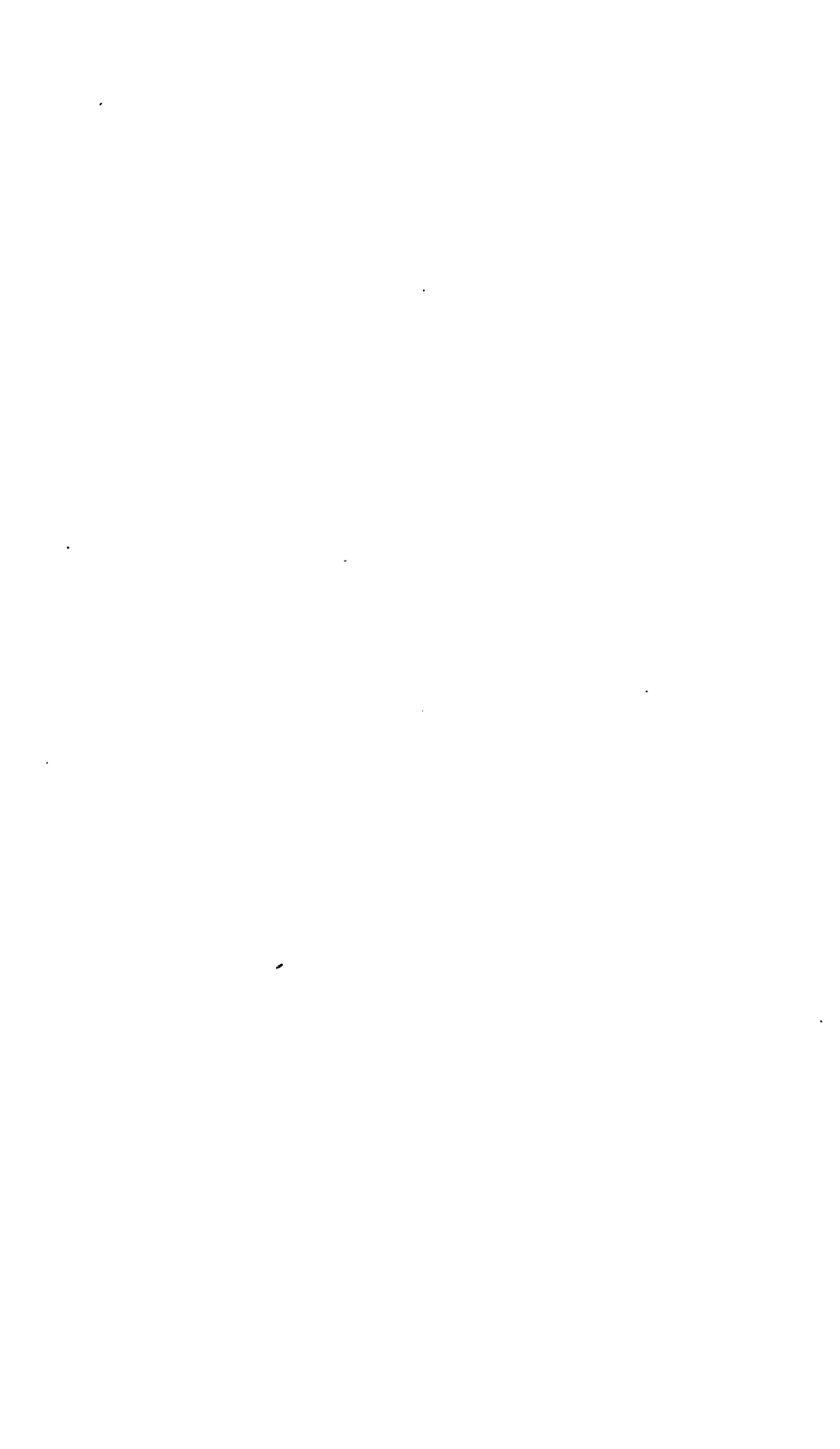
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217

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON

BETWEEN

NOVEMBER 13, 1893, AND JUNE 26, 1894.

ROBERT G. MORROW,
REPORTER.

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
OREGON.

[Decided November 13, 1893; modified April 23, 1894.]

GRAY v. PERRY.

[S. C. 24 Pac. Rep. 691.]

VENDOR AND PURCHASER—FORFEITURE OF REAL ESTATE CONTRACT.—

Where a contract for the sale of land provides that in case of default in paying any installment of the price therein provided for it shall be optional with the vendor to declare the contract cancelled and the amount paid thereon forfeited, the vendor does not forfeit the vendee's money or cancel the contract by conveying the land to a third person, when this person takes the conveyance and pays the balance due on the bond to the use and benefit of the original vendee—the transaction amounts only to a transfer of the vendor's rights. The result of a transfer by the vendor to a disinterested party after condition broken, is referred to but not decided.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by Chas. H. Gray against Jefferson Perry and Walter Corbin and wife to enforce a claim upon real property. The facts show that on May first, eighteen hundred and ninety, the defendant, Walter Corbin, entered into a contract with Messrs. Haight & Donner, whereby they, in consideration of one hundred and ten dollars paid down, and of seven hundred and ninety dollars payable in installments of twenty dollars

Statement of the case.

on the first of each month, agreed to convey to him lots eleven and twelve of block twelve of Maegly Highland, in Multnomah County, Oregon. Said contract contains a provision that if default be made in the payment of any installment, it shall be optional with them to declare the contract cancelled, and the amount paid thereon forfeited. Mr. Corbin entered into the possession of the lots, made improvements thereon, and paid the installments to and including that of January first, eighteen hundred and ninety-one, but made no payments thereafter. On July thirty-first, eighteen hundred and ninety, the plaintiff, Gray, loaned three hundred dollars to Mr. Corbin, who, as security therefor, executed and delivered to him a deed for said lots, and since that time has made payments to the plaintiff which have reduced the amount of the loan still due to two hundred and twelve dollars and thirty-three cents. On November fourteenth, eighteen hundred and ninety-one, these lots with the improvements were reasonably worth one thousand three hundred dollars, while there was due on the contract only eight hundred and seventy-two dollars and twenty cents, and on that day G. T. Donner, who had acquired the legal title from Messrs. Haight & Donner, conveyed them, with another lot, to the defendant Jefferson Perry, who is the father-in-law of the plaintiff Gray, and of the defendant Walter Corbin. The plaintiff alleges that the defendant Perry advanced the amount due upon the contract as a loan to the defendant Corbin, and, by agreement with him, took the legal title as security therefor. The defendant Perry denied these allegations, and for a separate answer and defense, alleges that before these lots were conveyed to him, G. T. Donner had declared a forfeiture of the payments made by the defendant Corbin, and had cancelled the contract, and that he had purchased the property, and taken the title for his own use and benefit.

• Argument of counsel.

The court, after hearing the testimony, decreed that the lots be sold, and that the proceeds of such sale be applied, —first, to the payment of the costs; second, to the repayment of the eight hundred and seventy-two dollars advanced by the defendant Perry; third, to the repayment of the two hundred and twelve dollars and interest still due from the defendant Corbin to plaintiff; and, fourth, that the remainder be paid to the defendant Perry, from which decree he appeals. The plaintiff also appeals from that part which provides that his claim is subordinate to that of the defendant Perry.

MODIFIED.

Mr. Francis D. Chamberlain (*Mr. Thomas N. Strong* on the brief), for Perry.

The important clause in the bond read as follows: "And it is understood and agreed between the parties that time is of the essence of this contract, and that the parties of the first part have the option to declare the amounts paid hereon forfeited and this contract cancelled unless the payments hereinbefore mentioned shall be made at the times and places herein provided."

1. Donner had the right to cancel this contract since the bond declares time to be the vital part of the contract, and by its express terms provides for cancellation on Corbin's failure to promptly meet the deferred payments. The following cases aptly illustrate the rights of the parties: *Snider v. Lehnherr*, 5 Or. 385; *Fitch v. Boyd*, 55 Ill. 307; *Chrisman v. Miller*, 21 Ill. 227; *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484; *Prince v. Griffin*, 27 Iowa, 514; *Bullock v. Adams*, 20 N. J. Eq.; *Gray v. Tubbs*, 43 Cal. 359.

2. The evidence clearly shows that Donner did cancel the bond; Corbin was nearly a year in default in his payments, and Donner had notified both him and Gray to pay

Argument of counsel.

the installments or suffer a cancellation and forfeiture.

3. Perry bought the property for himself and Corbin has no interest in it. The purchase price which Corbin was to pay Donner for the two lots was nine hundred dollars. Perry paid Donner for the two Corbin lots and a third lot, the note and mortgage of another party for one thousand eight hundred dollars, and some interest. A year afterwards, Perry sold the third lot for eight hundred dollars, leaving more than one thousand dollars that Perry paid Donner for the two Corbin lots.

4. In any view of the case, Gray has no claim against the property as against Donner or his successor in interest, until he first pays the amount due on the bond. The only interest Corbin ever had in the property was the right to a deed, on making the payments called for in the bond. Until full payment was made, the property belonged to Donner, and he could do with it as he pleased.

Mr. William M. Gregory, for Gray.

The circumstances surrounding a transaction tell what the transaction was more plainly than direct testimony of the parties. The acts of the parties at the time of a transaction speak plainer than words. The findings of fact will, I think, not be disturbed by the court. If the payment made by Perry to Donner was intended by Perry as a loan to Donner, I suppose it will not be denied that the results follow that Corbin's obligation to Donner was thereby satisfied, and that Perry, as between himself and plaintiff, held the title precisely as Corbin would have held it, had the deed from Donner been made to him, that is, subject to the mortgage made by Corbin, in plaintiff's favor.

That an interest in land, such as Corbin held under

Per Curiam.

contract of purchase, may be mortgaged: See *Bank of Louisville v. Baumeister*, 7 S. W. 170, 87 Ky. 6.

PER CURIAM.

The question whether G. T. Donner had declared a forfeiture and cancellation of the contract must be decisive of this appeal. It is contended that the deed from Donner to Perry was a forfeiture of said contract. If it be admitted that this conveyance was another and different sale of the property from that agreed to be made to the defendant Corbin, then it would be a forfeiture of his contract: *Chrisman v. Miller*, 21 Ill. 227. Mr. Perry testifies that he bought the lots for his own use and benefit, and that there was no agreement entered into whereby he should hold the title for Mr. Corbin. He also testified that he was willing to convey the property to the plaintiff upon the repayment of his money. Mr. Corbin's testimony, in the main, corroborates that of Mr. Perry, but he says that he supposed he could secure the lots by paying Mr. Perry his money. Mr. Donner testified that when he was negotiating with Mr. Perry for the sale of these lots, he told him that if they made a contract he wanted him to stand between him and Mr. Gray, and that Mr. Perry agreed to see that he got into no trouble about the matter. The record shows that when Mr. Perry paid the money and took the deed, Mr. Donner made the following entry in his books: "Eighteen hundred and ninety-one, November fourteenth. Walter Corbin by J. L. Perry (twelve) eight hundred and seventy-two dollars and twenty cents." It also shows that Mr. Corbin has been living on this property without paying any rent, and that Mr. Perry is now living with him, and that they are on friendly terms, while Mr. Gray and his wife are not very friendly to Mr. Perry. From a careful examination of the record, we conclude that there had

Per Curiam.

been no forfeiture or cancellation of the contract, that the conveyance to Mr. Perry was for the use of Mr. Corbin, and hence the decree is affirmed.

ON REHEARING.

PER CURIAM.

Upon consideration of the petition for rehearing in this suit, and a reëxamination of the questions presented by the transcript herein, it appears that the decree of the court below and of this court should be modified as follows: 1. That plaintiff have a decree against the defendant Corbin for two hundred and twelve dollars and thirty-three cents, and interest thereon, together with his costs and disbursements, and for the foreclosure of the lien of his mortgage. 2. That plaintiff have the right to redeem the property from the defendant Perry upon the payment of eight hundred and seventy-two dollars and twenty cents, and legal interest thereon from November fourteenth, eighteen hundred and ninety-one, within ninety days from the entry of the mandate in the court below, and if no redemption be made within that time, plaintiff's right to redeem be forever barred and foreclosed. 3. If redemption be made within the prescribed time, then the property to be sold under plaintiff's decree and the proceeds applied as follows: (1) To the expenses of the sale and the costs and disbursements of this suit. (2) To the satisfaction of plaintiff's claim, including the amount due from the defendant Corbin, and the amount paid the defendant Perry upon redemption, and legal interest on each amount. (3) The remainder, if any, to be paid to the defendant Perry. And it is so ordered.

MODIFIED.

Statement of the case.

[Argued July 2; decided November 13, 1893.]

ESSON v. WATTIER.

[S. C. 34 Pac. Rep. 754.]

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1. **INJUNCTION—NUISANCE—EQUITY.**—A court of equity will restrain the continuance of a nuisance when the complainant will sustain some irreparable injury, or be compelled to resort to a multiplicity of actions for damages; but this general rule is subject to this limitation, that the complainant must allege and prove that he has sustained some private, direct damage other than that suffered by the public at large. *Luhrs v. Sturtevant*, 10 Or. 170, approved and followed.
2. **INJUNCTION TO RESTRAIN ERECTION OF DAM—OVERFLOW OF WATERS.**—The construction of a dam will not be enjoined on the ground that it will cause the water to overflow the banks of the river and flood plaintiff's land, unless it is shown that in consequence of the existence of the dam, lands belonging to plaintiff will be submerged which would not otherwise be.
3. **INJUNCTION—NUISANCE.**—To justify a court of equity in interfering by injunction to abate a nuisance, the nuisance must be an actual existing offense, and not merely apprehended.

APPEAL from Marion: GEO. H. BURNETT, Judge.

This is a suit by Alexander Esson against Vallier Wattier to enjoin the defendant from constructing a dam across Big Pudding River, in Marion County. The facts show that plaintiff owns and resides upon a tract of land containing about three hundred and twenty acres, the southern boundary of which, at the nearest point, and about four fifths of a mile above defendant's dam, is separated from the river by a bank about eight feet wide. Poison Lake, a low, marshy tract, lies east of, and partly upon, plaintiff's land, from which a creek flows northwest, and empties into the river below the dam. This river is a sluggish stream, having a fall of about three feet to the mile, and its banks, above the dam, are twelve to twenty feet higher than the ordinary stage of water. The winter freshets, however, cause the river to rise rap-

Argument of counsel.

idly and back the water into Poison Lake, and plaintiff's land is liable to be submerged thereby. The defendant owns a saw and gristmill at Parkersville, valued at about eighteen thousand dollars, which are operated by water supplied through races from the river, and from Lake Labish. The defendant's predecessor in interest, in eighteen hundred and fifty-four, built a brush dam about twelve feet high across the river, which, in eighteen hundred and eighty, was in part carried out by a freshet, and the defendant, from time to time thereafter, tore down the remainder, and in eighteen hundred and ninety-one began to drive piles in its place, to build a new one eight feet high, when this suit was commenced. Plaintiff alleges that if the dam be erected the following injury will result: (1) It will obstruct a public navigable stream, but he does not allege that he will sustain any personal injury thereby; (2) that the water will percolate through the soil, and seventy-five acres of his land will be flooded by backwater, and become wet and unproductive, thus causing him irreparable injury, and necessitate successive actions from year to year to recover his damages; (3) that the water in the pond will become foul, stagnant, and unhealthy, impregnating the atmosphere with malaria, and that he and his family will be exposed to the danger of having their health impaired thereby. The issues being joined, the testimony was taken before a referee, and at the hearing the court, having found that the equities were with the defendant, made a decree dissolving a temporary injunction that had been issued and dismissing the complaint, from which the plaintiff appeals.

AFFIRMED.

Messrs. B. F. Bonham and W. H. Holmes, for Appellant.

In support of our claim that the defendant should be enjoined from erecting his proposed mill dam eight feet

Argument of counsel.

in height across Pudding River, we refer to the well-established rule of law that every one must so use his own property as not to materially injure or discommode his neighbor. That the proposed mill dam if erected will constitute a public nuisance in the neighborhood by overflowing the lands of the plaintiff and those of others in the same vicinity, and rendering large areas unfit for tillage or other profitable use is, we think, clearly established by the testimony.

In support of our positions as set forth in the complaint, we cite the following authorities: *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *People v. Cunningham*, 1 Denio, 536, 43 Am. Dec. 709; *Rhodes v. Whitehead*, 27 Texas, 304, 81 Am. Dec. 531; *Pettis v. Johnson*, 56 Ind. 139; *New Salem v. Eagle M. Co.* 138 Mass. 8; *Neal v. Henry*, 33 Am. Dec. 125; *Treat v. Bates*, 27 Mich. 390; *White v. Forbes*, Walker Chan. R. (Mich.) 112; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Marsh v. Trullinger*, 6 Or. 356; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352.

Mr. Geo. H. Williams (*Mr. C. E. S. Wood* on the brief),
for Respondent.

1. In the first place, the plaintiff does not state in his complaint facts sufficient to constitute a cause of suit. It is well settled that a private person cannot maintain a suit to abate a public nuisance unless he can show some special injury distinguished from that sustained by the public: *Luhrs v. Sturtevant*, 10 Or. 170.

2. Plaintiff does not pretend that the proposed dam will cause the water of the river to overflow its banks at ordinary stages, but he alleges that in times of freshet the water will overflow its banks; and all the evidence is to the same effect, and conclusive that it is only when there is an unusual flood that the water of the river will flow

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out of its banks. Certainly no injunction ought to be granted upon such a state of facts: *Smith v. King*, 23 Atl. 923; *Smith v. Agawam Canal Co.* 84 Mass. 355; *China v. Southwick*, 12 Me. 238; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, 47 Am. Dec. 474.

3. No facts are stated showing that the proposed dam, if constructed, will injure the plaintiff. He simply states his apprehensions. He says, in effect, that he is afraid that if this dam is constructed his lands will be injured by percolation of water through the banks of the stream, and that his lands will be overflowed by freshets, and that his family will be made sick by the rising of the water in the river. But the expression of these fears is no statement of facts; and a court will not enjoin a useful structure, necessary to the business interests of the community, upon the mere ground that somebody is afraid that injury will result from such structure: *Wolcott v. Melick*, 11 N. J. Eq. 204, 46 Am. Dec. 790; *Duncan v. Hayes*, 22 N. J. Eq. 27; *Thibault v. Conover*, 11 Fla. 143; *St. James's Church v. Arrington*, 36 Ala. 546; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221; *Sheboygan v. R. R. Co.* 21 Wis. 678.

Opinion by MR. JUSTICE MOORE.

1. Plaintiff's first contention is that Big Pudding River is a public navigable stream; that the erection of a dam across it creates a nuisance to prevent which he is entitled to the interposition of a court of equity. A court of equity will restrain a nuisance when it appears that the complainant will sustain irreparable injury, or be compelled to resort to a multiplicity of actions to recover damages for a continued existence thereof: *Bassett v. Salisbury Mfg. Co.* 43 N. H. 249. To entitle the plaintiff, however, to such relief, he must allege and show that he has sustained a special or personal injury. "A court of

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equity," says LORD, C. J., "ought not to interfere to prevent a public nuisance, or to abate one already existing, at the instance of a private party, unless he shows a special injury distinct from the public, actually sustained, or justly apprehended. The obstruction of a public highway is, without doubt, a public nuisance; but this of itself is not sufficient to justify the interposition of equity in behalf of the plaintiff, unless he sustains some private, direct, and material damage beyond the public at large": *Luhrs v. Sturtevant*, 10 Or. 170. Plaintiff has not alleged that the obstruction of the navigation of the river has caused, or will cause, him any special or personal injury, and hence he is not entitled to any relief on that ground.

2. Will the plaintiff sustain damage from backwater either by overflow or percolation? In *Fletcher v. Rylands*, L. R. 3 H. L. 330, Mr. Justice BLACKBURN, in the court of Exchequer Chamber, thus illustrates a rule applicable in this case: "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril." This principle, thus established, has since been applied to injuries resulting to adjoining land from the percolation of an artificial reservoir: *Gould, Waters*, § 296. If a dam be erected across a stream, and the water raised above the natural flow, it forms a reservoir which necessarily creates an artificial pressure: *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; and if the effect be to force the water through the earth from the reservoir to the neighboring lands, causing them to produce poorer crops, damages can be recovered for such injury: *Mason Mfg. Co. v. Fuller*, 15 Pick. 554; and, if damages be occasioned by raising a pond so as to injuriously affect neighboring lands, no distinction is made whether it be by overflowing or by percolation: *Fuller v. Chickopee Mfg. Co.* 16

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Gray, 46; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72. The rule deducible from these authorities may be briefly stated as follows: If a person, by artificial means, raises a volume of water above its natural level, and, by percolation, or by overflow, injures neighboring lands without license, prescription, or grant from the proprietor, the latter may invoke the interposition of a court of equity, and obtain an injunction to prevent it, when he would sustain irreparable injury, or be compelled to bring a multiplicity of actions to recover the damages as they accrued. It is not claimed that the proposed dam will, if erected, cause the water to overflow the banks of the river at ordinary stages, but that in times of freshet this danger is to be apprehended. The evidence is conclusive that it is only during freshets that the water of the river will overflow the banks. These freshets usually occur in the winter, about once in three years, when quite a portion of plaintiff's land is submerged, and this has happened each freshet since the dam was carried out. To entitle plaintiff to relief, he must show that, in consequence of the existence of the dam, lands of his would be submerged, which, without it, would not be. The evidence fails to establish this fact, and since the lands have been overflowed by freshets in the absence of the dam, it cannot be inferred that the damage from overflow would be augmented by its existence, and thus his injury, if any, must be due to percolation.

The plaintiff and his witnesses testify that the soil adjacent to the river is a sandy loam, while the defendant and an equal number of witnesses testify that it is a hard clay, except in a few places where an eddy of the river has deposited some sand. No direct evidence was offered that tended to prove that the water percolated through the soil, but this is sought to be established by proving that since the dam was carried out, a low place

about three fourths of a mile below its site, and but a few hundred yards from the river, had been cultivated which before that time was wet, and covered with brush, and from this it is claimed, by inference, that the fact has been established. The evidence shows that since the Willamette Valley was first settled many places that were then low and wet have since become dry and arable. Careful surveys of plaintiff's land were made by competent engineers, levels were run, and maps showing the topography thereof were offered in evidence by each party, from which it appears that there are ponds upon it which it was claimed were filled by percolation from the river. These surveys show that the water in each was much higher than the level of the river at the time they were made, and the inference must be drawn that they were filled by an overflow from the river, or from surface drainage, and not by percolation, as claimed by plaintiff.

3. It is contended that by erecting the dam the water will become foul, stagnant, and unhealthy, thereby impregnating the atmosphere with malaria, which will render the plaintiff and his family liable to sickness. When a dam causes an artificial head of water to become stagnant, and so corrupts the atmosphere as to impair the health of the neighborhood, it thereby becomes a nuisance, and is ground for relief in equity by injunction on the part of those suffering special injury therefrom. But to entitle a person to such relief the nuisance must actually exist, and not be merely apprehended: Gould, Waters, § 212. "A probability," says ROBERTSON, C. J., "that a thing may become a nuisance, or, in other words, an actual and substantial annoyance, public or private, does not make a nuisance which can be lawfully abated: *Gates v. Blincoe*, 2 Dans. 158, 26 Am. Dec. 440; and therefore, Lord HARDWICKE, in an anonymous case in 3

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Atkyns, said that 'the fears of mankind, though they may be reasonable, will not create a nuisance.' The evidence shows that plaintiff and his family were, before the dam went out, subject to attacks of malaria, but that since that time they have been quite free from its effects. It also shows that the earlier settlers on the higher land, as well as along the banks of Big Pudding River, were more or less subject to malarial attacks, but that, by the cultivation of the soil, or from natural causes, the health of the neighborhood has much improved, and the effect of malaria is now rarely felt. The plaintiff attributes these former attacks of malaria to the existence of the dam, but of this he cannot be certain since Poison Lake, which was then and now is a stagnant pool from which miasmatic poisons probably emanated, may have been the direct cause. The evidence fails to show that the erection of the dam would cause such injury to the health of the plaintiff or his family as he apprehends. Our statute, sections 3788-3826, Hill's Code, recognizes the necessity of mills for all manufacturing purposes, and has provided ample means for acquiring the right to erect dams and backwater to operate them, and a court of equity should hesitate before it ruthlessly destroyed a property of such value, unless the proof was clear and convincing that the backwater thus raised was detrimental to the health of the neighborhood. The decree of the court below is affirmed.

AFFIRMED.

Points decided.

[Argued October 20; decided November 18, 1893.]

SABIN v. COLUMBIA FUEL CO.

[S. C. 34 Pac. Rep. 692.]

25	18
26	288
34	692
35	854
36	852

25	15
27	101
29	179

25	15
31	480

25	15
38	384

25	15
41	204

25	15
43	571

25	15
47	102

1. **FRAUDULENT MORTGAGE.**—A mortgage designed and made for the benefit of the mortgagor, and to enable him to continue in business by placing his property beyond the reach of legal process, is void as to creditors, although it may be intended in good faith for the ultimate benefit of all the creditors by preventing a sacrifice of the property.
2. **IDEM—MORTGAGE FOR FUTURE ADVANCES.**—A person or corporation in the conduct of its business may mortgage its property to secure future as well as present advances (*Hendrix v. Gore*, 8 Or. 407; and *Nicklin v. Betts Spring Co.* 11 Or. 406, cited and approved); and a provision in a mortgage for securing future advances, not stipulating that the mortgagor may continue in business, or obligating the mortgagee to make any additional advances, does not render the mortgage void as against creditors, although the mortgagor was in fact unable to pay all his debts when the security was given.
3. **FRAUD—BURDEN OF PROOF.**—There is an essential difference between the material fact of fraud, and the circumstances tending to prove it; while some of the circumstances surrounding the making of a mortgage may point to the conclusion that it was intended to hinder and delay creditors, yet if they are explainable consistently with honesty and good faith, the mortgage ought to be sustained, and the burden of proving the fraud always rests on the plaintiff.
4. **FRAUDULENT CONVEYANCE—PARTICIPATION OF MORTGAGEE.**—The fact that a mortgagor may have intended to delay other creditors by giving a mortgage will not affect the validity of the instrument unless the mortgagee also participated in the fraudulent intent.
5. **INSOLVENCY DEFINED—PREFERENCES BY CORPORATIONS.**—The term "insolvency," as used in bankrupt and insolvency proceedings, denotes the inability of a party to pay his debts as they become due in the ordinary course of business, but for general purposes the popular meaning of the word is preferable, viz. the insufficiency of the entire property of an individual or corporation to pay his or its debts. Within this definition, so long as a corporation is a "going concern," engaged in the conduct of its regular business, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities, it is not in such a state of insolvency as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, even though the debt is one for which the directors are security.

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6. **PREFERENCES BY INSOLVENT CORPORATION.**—A corporation engaged in the business for which it was organized, although embarrassed and unable to pay its debts at maturity, is not necessarily insolvent so as to forbid preference of one creditor over another.
7. **ASSETS OF INSOLVENT CORPORATION AS A TRUST FUND***—The doctrine that the entire property of an insolvent corporation constitutes a trust fund which must be administered by the directors for the proportionate benefit of all creditors, without preference, can apply, if at all, only when that point is reached in the affairs of the corporation where its managers find themselves obliged to deal with its assets in view of a suspension, but not while the corporation is in good faith engaged in its usual business, although it may in fact be insolvent.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This suit was brought by R. L. Sabin, in behalf of himself and other unsecured creditors who might join with him, against the Columbia River Lumber & Fuel Company, a corporation, the Commercial National Bank, James F. Watson, trustee, Borthwick & Fraine, partners, and H. B. Borthwick, C. W. Knowles, and D. J. Moore, to set aside certain real and chattel mortgages given by the Columbia River Lumber & Fuel Company to Watson, as trustee, to secure the sum of fifty thousand dollars due the Commercial National Bank, and also to set aside an assignment by the company direct to the bank of all its accounts and bills receivable, as further security therefor, on the ground that the mortgages and assignment are

*NOTE.—The trust-fund doctrine as applied to the entire assets of insolvent corporations seems to have received a new impetus from the case of *Rouse v. Merchants Nat. Bank*, 5 L. R. A. 378, 15 Am. St. 644, 26 Ohio St. 493, 22 N. E. 293 (June, 1889), which was followed in *Thompson v. Huron Lumber Co.* 4 Wash. 600, 30 Pac. 741, and 31 Pac. 25. Since the decisions in these cases the subject has been elaborately discussed anew both in the courts and in the law magazines. Seymour D. Thompson vigorously defends the doctrine in 27 Am. Law. Rev. 846, and is seconded by Mr. W. W. Thornton in 38 Cent. Law. Jour. 240, where he cites and analyses many of the adjudged cases. The latest decisions of the federal courts are decidedly against the doctrine of the *Rouse case*. See *Gould v. Little Rock Ry. Co.* 52 Fed. 680; *Hollins v. Brierfield Coal & Iron Co.* 150 U. S. 371, 14 Sup. Ct. 127; *Brown v. Grand Rapids Furniture Co.* 58 Fed. 286, 20 L. R. A. 817.

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void as to the creditors of the fuel company. On the twenty-eighth and twenty-ninth of November, eighteen hundred and ninety-two, the Columbia River Lumber & Fuel Company, defendant, being indebted to its co-defendant, the Commercial National Bank, in the sum of fifty thousand dollars, upon certain overdue promissory notes, drafts, and overdrafts (upon three of which notes, amounting in the aggregate to about thirty-five thousand dollars, the defendants Borthwick, Knowles, and Moore, directors of the company, were endorsers) executed to the defendant Watson, as trustee for the bank, real and chattel mortgages upon all its property, and also assigned to the bank direct all its accounts and bills receivable to secure the payment of said indebtedness. The mortgages were immediately filed and recorded in the proper county, and the trustee took possession of the property described in the chattel mortgages, and continued to hold the same until the appointment of a receiver in this suit. At the time of the execution of the mortgages and assignment the lumber company was indebted in the sum of about thirty thousand dollars to divers and sundry persons, including the assignors of the plaintiff, in addition to the amount due the bank, and had property, consisting of a saw mill plant, real estate, lumber, wood, ledger accounts, and bills receivable, of the estimated aggregate

Also consult the voluminous note to *Lyons-Thomas Hardware Co. v. Perry Stove Co.* 22 L. R. A. 802.

On the question of whether the directors of a corporation can take security for debts due to themselves, and thereby obtain an advantage over other creditors, the courts seem to be in serious conflict. Practically all the authorities in both American and English courts will be found cited and discussed in the following cases, or in the voluminous notes attached to them, viz.: *Brown v. Grand Rapids Furniture Co.* 58 Fed. Rep. 286, 22 L. R. A. 817; *Mullanphy Savings Bank v. Schott*, 135 Ill. 655, 26 N. E. Rep. 640, 25 Am. St. Rep. 401; *Olney v. Conanicut Land Co.* 27 Am. St. Rep. 767, 5 L. R. A. 361, 16 R. I. 597, 18 Atl. Rep. 181; *Corey v. Wadsworth*, 23 L. R. A. 618, 11 So. 350; *Lyons-Thomas Hardware Co. v. Perry Stove Co.* 22 L. R. A. 806, note.—REPORTER.

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value of about one hundred thousand dollars. The plaintiff, who is a judgment creditor of the lumber company, claims that the mortgages are void as to creditors for the reason (1) that they are fraudulent, both in law and fact, as being made to hinder, delay, and defraud creditors; (2) that the company was insolvent at the time the mortgages were executed, and therefore could not create a preference in favor of one creditor; and (3) that, even if an insolvent corporation can create a preference, the mortgages are void so far as they are security for notes upon which the directors of the company are endorsers.

The real estate mortgage, after describing the promissory notes, drafts, and overdrafts intended to be secured thereby, contains this stipulation: "Said conveyance is also intended as a mortgage to secure the repayment to said bank of any future advances or overdrafts which the said bank make and allow to the said grantor in the conduct of the grantor's business. Now, therefore, if the said promissory notes, and each of them, principal and interest, and the said draft and overdraft above referred to, shall be paid when the same shall become due, or upon demand of payment where so payable, then this indenture shall be void; *provided, further*, that the said grantor, its successors or assigns, shall have paid into the said Commercial National Bank, its successors or assigns, such further sums of money (not exceeding in all the sum of ten thousand dollars), as the said bank may advance to the said grantor, or which may become owing by the grantor to the said bank at any time hereafter during the continuance of this mortgage, with interest on such further sums from the time the same shall be advanced, or become owing as aforesaid, at the rate of nine per cent per annum, payable quarterly. But in case default shall be made in the payment of the principal or interest mentioned in said promissory notes, or either of them, or any

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part thereof, or in the payment of the said draft and overdraft and future overdrafts, or any of them, or any part thereof, or the interest thereon, or any part thereof, then it shall become the duty of the said trustee hereinbefore named, upon ten days' written notice and demand therefor, to be given to said trustee by said bank, to foreclose this mortgage as by law provided, and to cause the sale of the said mortgaged premises, or so much thereof as may be necessary to pay the sums due said bank, together with such attorneys' fees as the court may adjudge reasonable for the foreclosure of said mortgage.

And whereas it has been, and is hereby, agreed between the Columbia River Lumber & Fuel Company and the Commercial National Bank, and the party of the second part herein, that time in the exact performance of each and everything herein required or agreed to be performed is of the essence of this contract; now, therefore, if the said Columbia River Lumber & Fuel Company shall neglect or fail to pay all or any of said promissory notes, drafts, overdrafts, or future overdrafts, or any of them, or any part of them, when the same shall become due and payable, or shall fail or neglect to pay the interest upon any of said demands in accordance with the terms of the agreement therefor between the said grantor herein and the said bank, or if the said grantor shall attempt to remove from its said mill any of the machinery or plant belonging thereto, or shall suffer its property to be attached, then, upon the happening of all or any of said contingencies, the entire indebtedness of said Columbia River & Fuel Company to said bank shall become at once due and payable, and it shall be the duty of said trustee to so declare the same, and upon one day's notice therefor to him given by the said bank, to foreclose said mortgage as provided by law, and to cause the sale of

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said mortgaged property, or so much thereof as may be necessary to satisfy the demands of the said bank against said grantor, together with costs, disbursements, expenses, and attorneys' fees.

The chattle mortgages contain the same provisions as to future advances and overdrafts as the real estate mortgage, and provide that "in case default shall be made in the payment of the said principal sums, or any of them, or interest thereon, or any one of said installments of the principal or interest, or if said property is attempted to be removed by any one from where it is now situated, or be attached, or levied upon by the creditors of the said party of the first part, or shall be sold, transferred, or assigned, or attempted to be sold, transferred, or assigned, then said promissory notes, drafts, overdrafts, and debts shall at once become due and payable, and it shall and may be lawful for, and the said party of the first part does hereby authorize and empower the party of the second part, with the aid and assistance of any person or persons, to enter the several places where said personal property may be situate, and such other place or places as the said goods or chattels are or may be placed, and take or carry away the said goods and chattels, and sell and dispose of the same at private sale, or at public auction, upon giving one week's notice of the same in any newspaper published in said county of Multnomah, and state of Oregon, and out of the money arising therefrom to retain and pay the said sums above mentioned, and interest as aforesaid, and all charges touching the same, and counsel fees, rendering the overplus, if any, unto the said party of the first part. And it is understood that the party of the second part shall and does take possession of all the personal property described in this instrument, and shall retain the same in trust for the purposes herein expressed, and to that end may appoint any suit-

Argument of counsel.

able person to hold possession of and care for said property." Testimony having been taken in open court, a decree was entered sustaining the validity of the transfers and mortgages to the bank, discharging the receiver, and dismissing the complaint, from which the plaintiff appeals.

AFFIRMED.

Mr. Lewis B. Cox (Messrs. Wirt Minor and Jos. N. Teal on the brief), for Appellant.

The instruments complained of are void as having been made with the intent to hinder, delay, and defraud the unsecured creditors of the lumber company under sections 3059, 3063, Hill's Code. The transactions shown by the evidence to have taken place between the lumber company and the bank unquestionably are void as against other creditors under these sections: *Van Nest v. Yoe*, 1 Sand. Ch. 4; *Wheelden v. Wilson*, 44 Me. 11; *Kimball v. Thompson*, 4 Cush. 441, 50 Am. Dec. 799; *De Wolfe v. Sprague Mfg. Co.* 49 Conn. 382; *Bank v. Inloes*, 7 Md. 380; *Jones v. Syer*, 52 Md. 211; *Dunham v. Waterman*, 17 N. Y. 9, 72 Am. Dec. 406; *Gardner v. Bank*, 95 Ill. 298; *Same v. Same*, 13 R. I. 155; *Bank v. Knowles*, 67 Wis. 373; *Blennerhasset v. Sherman*, 105 U. S. 100; *Thompson v. Huron Lumber Co.* 4 Wash. 600.

The lumber company was insolvent in law and fact at the time these instruments were executed: *Wait on Insolvent Corporations*, § 28; *Parish v. Murphree*, 13 How. 100; *Toof v. Martin*, 13 Wall. 40; *Thompson v. Thompson*, 4 Cush. 127; *Lee v. Kilburn*, 3 Gray, 594; *Hazleton v. Allen*, 3 Allen, 114; *Vennard v. McConnell*, 11 Allen, 555; *Herrick v. Borst*, 4 Hill, 650; *Webb v. Sachs*, 4 Saw. 158; *Churchill v. Wells*, 7 Cold. 364; *Clay v. Towle*, 78 Me. 86.

That insolvent corporations cannot make preferences to creditors is a doctrine declared and contended for by all the text writers: 2 Morawetz, Corporations, § 803;

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Taylor on Private Corporations, §§ 34, 654-68, 759; Wait on Insolvent Corporations, §§ 662, 654; 2 Story's Equity Jurisprudence, § 1252; 2 Pomeroy's Equity Jurisprudence, 1046. While the weight of the adjudicated cases is against the proposition, there is strong judicial authority in its support: *Tank Line Co. v. Varnish Co.* 45 Fed. 7; *White Mfg. Co. v. Pettes Imp. Co.* 30 Fed. 864; *B. & O. Tel. Co. v. Interstate Tel. Co.* 54 Fed. 50; *Robins v. Embry*, 1 S. & M. Ch. 207; *Rouse v. Bank*, 46 Ohio St. 493; *Thompson v. Huron Lumber Co.* 4 Wash. 600; *Bank v. Knowles*, 67 Wis. 373; *Haywood v. Lumber Co.* 64 Wis. 639; *Kankakee Mill Co. v. Kampe*, 38 Mo. App. 229; *Marr v. Bank*, 4 Cold. 471; *Smith v. Putnam*, 61 N. H. 632.

While this court has never passed immediately upon the point, the doctrine has been incidentally recognized in *Powell v. W. V. R. Co.* 15 Or. 393; *Schetter v. Southern Oregon Co.* 19 *Id.* 192. And necessarily results from the opinion in *Hutchinson v. Bidwell*, 24 Or. 219.

Mr. Geo. H. Durham, for Commercial National Bank;
Mr. Edward B. Watson, for other Respondents.

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The contention for the plaintiff is that the mortgages show on their face that they were made for the benefit of the mortgagor, and were designed to be used as a shield between the corporation and its unsecured creditors, while it prosecuted its business for an indefinite time. It is undoubtedly true that where a mortgage is designed and made for the benefit of the mortgagor, and to enable him to continue in business by placing his property beyond the reach of legal process, it is void as to creditors, although it may be intended in good faith for the ultimate benefit of all the creditors by preventing a sacrifice of the property; and if such is the legal effect of the instrument,

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the courts will so declare as a matter of law, for, as was said by the Vice Chancellor in *Van Nest v. Yoe*, 1 Sand. Ch. 9, "The law provides that the debtor shall fulfil his obligations, and on his default it gives to the creditor his 'lawful suit' for the recovery of his demand, and the sale of the property of the debtor for its payment. This is a strict right. And the debtor who * * * places his property beyond the reach of the process of the law, whatever may be the pretense under which he cloaks the act, in the language of the statute of frauds, 'hinders' and 'delays,' and ultimately 'defrauds,' his creditors. It is no answer to this argument to say that the debtor provides an ample fund for the payment of the debt, and that the creditor is ultimately to be paid in full. The law gives to the creditor the right to determine whether his debtor shall have further indulgence, or whether he will pursue his remedy for the collection of the debt. The deferring of payment is generally an injury to the creditor; and he may be overwhelmed with bankruptcy for the want of the fund which is locked up by the voluntary assignment of his debtor. It is a mockery to such a creditor to say that the assignment is made for the benefit of creditors."

2. Particular stress is laid upon the fact that provision is made by all these instruments to secure the bank for advances or overdrafts which it might thereafter make or allow the corporation in the conduct of its business. It seems to us, however, that there is nothing in the terms of the mortgages in question, which, if carried into effect according to a reasonable construction, would of necessity in any way unjustly hinder or delay creditors. From the provision as to future advances it may be inferred that it was the intention that the mortgagor should be permitted to continue in business for its own benefit, yet there is no stipulation in express terms to that effect, or, in fact, that it shall be allowed to continue in business at

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all, or that the bank shall make any advances, but it is rather a provision that if the bank should see proper to make future advances, such advances should be secured by the mortgages. In this view such provision does not render the mortgages void, and we are bound to construe the terms of the instrument in harmony with honesty and fair dealing, if it can be done without doing violence to the language. The company was at the time in active business, and had an undoubted right to provide by mortgage of its property for future advances: *Hendrix v. Gore*, 8 Or. 407; *Nicklin v. Betts Spring Co.* 11 Or. 406, 50 Am. Rep. 477, 5 Pac. Rep. 511. And such a provision does not necessarily render the mortgage fraudulent, although it may subsequently turn out that the mortgagor was in fact unable to pay all his debts at the time the mortgage was given: *U. S. v. Hooe*, 3 Cranch, 73. Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's own property, and to pledge or otherwise dispose of it, is neither an unjust nor unlawful interference with the rights of others, and is not within the terms of the statute making void conveyances intended to hinder or delay creditors.

3. Nor are we able to concur with the contention of counsel that the evidence shows the mortgages to be fraudulent in fact. There are some circumstances, it is true, which, unexplained, on their face tend to support this contention; such as, for instance, that the corporation was financially embarrassed at the time the mortgages were given; that the debts were long overdue, and no time is provided in the mortgages for payment; the inference that it was contemplated the company should continue in business at the pleasure of the bank, which is sought to be drawn from the stipulation for future

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advances, and the restriction imposed upon the trustee to foreclose only when requested by the bank; that the only possession in fact taken by the trustee was by appointing the agents and officers of the corporation agents for him, and allowing them to sell and dispose of the property, turning into the bank the proceeds, which were credited on overdrafts paid by the bank subsequent to the execution of the mortgages; that no special effort was made by the bank to collect the accounts and bills receivable assigned to it except by appointing and authorizing the officers of the company to do so; that the length of time the bank was to suffer the mortgages to remain unforclosed was to depend on circumstances, as testified to by its cashier. While these circumstances point with more or less directness to the conclusion that the mortgages were intended to hinder and delay creditors, yet they are all explainable consistently with honesty and good faith. And when it is remembered that the debt for which the security was given was a *bona fide* debt long overdue, and about which the bank had manifested much solicitude; and it was only after repeated and urgent solicitation, and when the company found itself unable to obtain further accommodation at the bank, that it concluded to give the mortgages; that these were promptly filed and recorded, and there was no attempt at concealment, but the entire transaction was open and above board, it seems to us that upon the whole case it cannot be said that the mortgages were not executed in good faith to secure the debt. The mortgages are *prima facie* valid, and to overcome this presumption it is not enough that some of the circumstances attending the transaction may tend to show fraud. There is an essential difference between the material fact of fraud and the circumstances tending to prove it. The burden of proof is on the plaintiff, and the mortgages must be deemed valid until he overcomes the

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presumption by a clear preponderance of the evidence. The findings of the trial court who heard the witnesses, and was therefore in a better position to judge of the effect and value of their testimony than we are, were in favor of the defendant, and, while the case is not free from doubt we are unprepared to say that such findings are unwarranted by the testimony.

4. It is claimed there is some evidence which tends to show that one object of the company in giving the mortgages was to hinder and delay creditors by preventing a sacrifice of its property. But it cannot, we think, be successfully contended that the bank participated in the fraudulent purposes of the company, if any such existed, or had any other motive for taking the mortgages than a desire in good faith to secure its claim; and although it may have known the mortgages would operate to hinder and delay other creditors, and even if it knew the company intended them to have that effect, the transaction will not be void unless the bank participated in the fraudulent purpose of the company: 2 Cobbey on Chat. Mortg. § 771; *Dudley v. Danforth*, 61 N. Y. 626; *First Nat. Bank v. Lowrey*, 36 Neb. 290, 54 N. W. 571; *Alberger v. White*, 117 Mo. 347, 23 S. W. 92; *Shelley v. Boothe*, 73 Mo. 74, 39 Am. Rep. 481; *Pollock v. Meyer*, 96 Ala. 172, 11 South. 385; *Ford v. Williams*, 3 B. Mon. 550; *Worland v. Kimberlin*, 6 B. Mon. 608, 48 Am. Dec. 785; *Covanhovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57; *Hodges v. Coleman*, 76 Ala. 103; *Olmstead v. Mattison*, 45 Mich. 617, 8 N. W. 555. If a debtor converts his property by sale into money because it is more easily secreted, intending to put it and its proceeds out of reach of his creditors, he of course commits a gross fraud, and one who purchases of him with knowledge of his object in making the sale obtains no title as against creditors, though he may have paid the full price. But the rule is differ-

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ent when the property is taken in payment of, or as security for, a *bona fide* debt, which only amounts to giving one creditor preference over another. In the absence of a statute a debtor in failing circumstances may prefer one creditor to another by giving him adequate security for his debt to the exclusion of others. The right to give such preference necessarily implies the right of the creditor to accept it, and if he accepts the preference in good faith, without fraudulent purpose on his part, it will not be void on account of the motive which may have prompted the debtor to make it. One creditor is not bound to take care of another. He has a right, in good faith, to demand and receive the property of his debtor as security for his debts, though he may know that he will thereby withdraw the means of satisfying other creditors, and though he may know that the debtor thereby intends to hinder, delay, or defraud such other creditors. It is simply a race of diligence in which the law rewards the successful party provided he acts in good faith.

5. It is urged, also, that at the time the mortgages were given the corporation was insolvent, and that the bank knew, or suspected, that it had not sufficient means to pay all its creditors in full, and demanded security for its debt, and thereby obtained an undue advantage over other creditors. If these conditions actually existed, the validity of the security so taken might well be questioned; but we do not think there was such a condition in the financial affairs of this company as would justify the conclusion that a state of insolvency existed which would preclude the bank from demanding and receiving the security which was given for its debt. It is true that at this time the company was largely in debt, and may perhaps have been insolvent within the meaning of that term as used in the bankrupt or insolvent laws. It was, however, a "going concern," engaged in the conduct of

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the business for which it was incorporated, and not known or believed by its officers or agents to be insolvent, and with assets exceeding its liabilities by at least twenty thousand dollars, according to the least value placed thereon as appears from the testimony. Such a corporation can hardly be said to be insolvent within the rule sought to be invoked in this case. It is difficult, if not impossible, to lay down a definition of insolvency applicable to all cases. It must necessarily be construed with reference to the facts of each particular case. In its general and popular meaning it is used to denote the insufficiency of the entire property of an individual to pay his debts, but under the bankrupt and insolvency proceedings, which were designed for the benefit of the debtor, it is used in a more restricted sense, and denotes the inability of a party to pay his debts as they become due in the ordinary course of business: *Toof v. Martin*, 13 Wall. 40; *Webb v. Sachs*, 4 Sawy. 158. And to this effect are the authorities cited by plaintiff. We are, however, not disposed to apply the rigor of the rule that obtains in bankruptcy proceedings to a case of this character. It often happens that corporations with assets more than sufficient to pay all their debts are unable to meet an outstanding obligation as it matures, and, without undertaking to lay down any definite rule by which the question of the solvency or insolvency of a corporation may be determined, it is sufficient for the purposes of this case to say, that so long as a corporation is a "going concern," engaged in the conduct of the business for which it was organized, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities to the extent shown by the testimony in this case, it is not in such a state of insolvency as will preclude its executing a mortgage on its property, in good faith, to secure a debt of the corporation, even though the debt may be one for which the directors are security.

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As the corporation was not insolvent, it is unnecessary to examine or decide the question as to the right of an insolvent corporation to prefer creditors, or of a director of such a corporation to secure the debts thereof for which he is personally liable. It follows that the decree of the court below must be affirmed.

AFFIRMED.

ON REHEARING

[85 Pac. 354.]

Opinion by MR. JUSTICE BEAN.

The opinion in this case is challenged by a petition for rehearing because it is held therein that if the mortgages were taken by the mortgagee in good faith to secure an honest debt, the motive or purpose of the debtor in giving them was immaterial. This question has been reexamined both on this petition and in *The Durand Organ & Piano Co. v. Bowman*, just decided, and the opinion of the chief justice in the latter case renders the further discussion of that subject unnecessary.

It is also challenged because it is substantially held that a corporation engaged in the conduct of the business for which it was organized, although embarrassed and unable to pay its debts at maturity, does not necessarily become insolvent within the meaning of the authorities holding that an insolvent corporation cannot prefer one creditor to another, and counsel say they "are at an utter loss to imagine why the same rule should not be applied in such cases as in bankruptcy proceedings." The reason is manifest. A corporation conducting a business of the magnitude and character of this depends for its very life upon credit. It could not run a single day without it. It must have credit in bank and with those with whom it deals, and to say that it is insolvent within the meaning of the rule invoked because it is unable, by reason of a

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dull market or other cause, to meet its obligations in the ordinary course of business at maturity, or because sufficient could not be realized from its property at forced sale to pay its debts, would be to deny to such a corporation the *jus disponendi* of its property, and the right to continue in business. In *Corey v. Wadsworth*, 11 South. 350, 23 L. R. A. 618, the court, in defining at what stage of a corporation's affairs it must be pronounced insolvent so as to bring it within the rule prohibiting preferences, says: "It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business with the prospect and expectation of continuing to do so; in other words, if it be in good faith, what is sometimes called a 'going' business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full."

Mr. Thompson, who is an able advocate of the "trust-fund" doctrine, says upon this subject: "The meaning of the doctrine is not that such assets (of a corporation) are in any strict or close sense a trust fund for the creditors of a corporation while it is a going concern. It does not, in any sense, disable the directors from dealing with the assets of the corporation, in the ordinary course of its business, as fully as an individual might under the same circumstances deal with his assets. But its meaning is that, when the line of insolvency is reached or approached, so that the directors can no longer deal with the assets of the corporation in the ordinary course of business, but must deal with them in the contemplation of insolvency and suspension, then the assets become, in the hands of the directors, a trust fund for the creditors of the corporation, and the directors become the trustees of that fund." And, illustrating the doctrine, he puts the case of a bank,

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which, after resisting a run, made by its depositors, by payment of their demands over its counters, is finally compelled to suspend, and says: "So long as it did that, it was acting in the regular course of its business; and, in the absence of a statutory prohibition, under all legal conceptions, the preferences obtained by those depositors were honest and lawful, and were made in good faith because they were made when the directors believed that they would be able to pay all in full." But if, after closing its doors, the directors resolve to single out certain of its depositors and pay them in full, or divide among them what remains, such a transaction would come, he says, within the doctrine prohibiting an insolvent corporation from preferring one creditor to another: 27 Am. Law Rev. 846. It seem to us that the doctrine for which plaintiff contends can only apply, if at all, when that point in the affairs of the corporation is reached where its managers find themselves obliged to deal with its assets in view of a suspension by reason of its insolvency, but not while the corporation is in good faith engaged in the business for which it was organized, although in fact it may be insolvent. This principle is borne out by *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* 24 S. W. R. 16, *Duncomb v. N. Y. H. & N. R. R. Co.* 88 N. Y. 1, and *Currie v Bowman*.

The decision of the lower court is affirmed.

AFFIRMED.

Argument of counsel.

[Argued October 24; decided November 20, 1893.]

BECK v. VANCOUVER RAILWAY CO.

[S. C. 24 Pac. Rep. 752.]

1. **RAILWAYS—CONTRIBUTORY NEGLIGENCE.**—A railway track is always a place of danger, and one who ventures to walk upon it must make vigilant use of his eyes and ears, and, upon discovering an approaching train, must leave the track if it is possible to do so; neglect of these precautions is such contributory negligence as will prevent a recovery in case injury results.
2. **IDEM.**—If one deliberately, and with his eyes open, goes into danger, he will not be heard to complain because he has been injured; it is his duty to use all the ordinary means that men generally use for their preservation, and if he fails in that regard, if he is apprised of the situation, and chooses a way of danger when a way of safety is open to him, he is guilty of contributory negligence, and must abide the result of his hardihood.
3. **RAILWAYS—NEGLECT—SPEED OF TRAINS.**—Running a railroad train faster than is permissible under an ordinance which merely prescribes a penalty for violating its provisions is not negligence *per se*; but is a circumstance proper to be submitted to the jury with the other evidence in the case.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This is an action by Michael Beck against the Portland & Vancouver Railway Company to recover damages for personal injuries alleged to have been sustained by the plaintiff, and caused by the negligence of the defendant. The answer denied the alleged negligence, and set up as a defense the contributory negligence of the plaintiff, which the reply denied. The trial resulted in a verdict and judgment for the defendant, from which this appeal was taken.

AFFIRMED.

Mr. Berryman M. Smith (Messrs. Victor K. Strode and Chas. N. Wait on the brief), for Appellant.

The instruction given by the court concerning the speed of the train seems to consider a violation of a city

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25	32
38	441

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ordinance or statute regulating the speed of trains as a mere circumstance tending to show neglect on the part of the company. We submit that the better rule, and the one supported by a large majority of the cases, is that a breach of duty imposed by law in this regard constitutes negligence *per se*: *Keim v. Union Ry. Co.* 90 Mo. 314; *St. Louis Ry. Co. v. Dunn*, 78 Ill. 197; *Correll v. Ry. Co.* 38 Iowa, 120; 18 Am. Rep. 22; *Railway Co. v. Donovan*, 84 Ala. 141; *Railway Co. v. Knutson*, 69 Ill. 103; *Piper v. Chicago Ry. Co.* 77 Wis. 247; *Chicago Ry. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761; 2 Thompson on Trials, 1232; 2 Rorer on Railways, 1006.

Mr. Geo. H. Durham (*Mr. Harrison Gray Platt* on the brief), for Respondent.

The following cases are ample authority for the instruction of the court regarding the speed of trains as compared with the speed allowed by ordinance: *Studley v. St. Paul Ry. Co.* 57 N. W. Rep. 116; *Phila. R. R. Co. v. Stebbing*, 62 Md. 517; *McKonkey v. C. B. & Q. R. R. Co.* 40 Iowa, 206; *Horn v. B. & O. Ry. Co.* 54 Fed. 304; *Shearman & Redfield on Negligence*, § 478.

Opinion by MR. CHIEF JUSTICE LORD.

The errors assigned relate principally to certain instructions given by the court, to which exceptions were reserved. Before proceeding to discuss the points raised, a brief outline of some of the facts is essential, to show the location of the street where the accident occurred, the nature of the cut through which the cars passed, and the circumstances connected therewith. Other facts, as far as necessary, will be stated in connection with the points discussed. The record discloses that the defendant's railroad passes along Margaretta Avenue, a street of the

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city of Albina, now within the corporate limits of the city of Portland; that the accident occurred on the line of said railroad, at a point on this avenue where there is a cut about one hundred and fifty feet in length, with banks varying in height from three to six feet; that neither at the time of such accident, nor prior thereto, had any sidewalk been laid on said avenue, but that it had been the habit of pedestrians to use the track through the cut as a pathway, of which the defendant had notice; that on the night of the accident, at about eleven o'clock, the plaintiff was found in an unconscious state, lying near the middle of said cut by the side of the railway track, very seriously injured, whence he was taken to the hospital.

The plaintiff testified that at about nine or ten o'clock on the night of the twenty-fourth day of September, eighteen hundred and ninety-one, he was walking along the railroad track, and that, when he was near the middle of said cut, one of the defendant's trains, drawn by a dummy or locomotive, suddenly approached him, running at a speed of eighteen or twenty miles an hour, from a northerly direction, without having any headlight, or giving any warning or signal, and that he had no notice of its approach until it was within one hundred feet of him; that he endeavored to stop the train by hallooing, and tried to escape, but owing to the fact that he was very much excited, and in great fear at his perilous position, he failed to avoid the train, which struck him, causing the injuries alleged; that before he entered the cut, he looked up and down the railway track, and also listened for the approach of any trains that might be coming, and that he did not see or hear any; that the track was a tangent for a considerable distance either side of said cut where the accident occurred; and that the night was dark and foggy. The defendant's evidence

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tended to show that the headlight on the train was lighted at the time the accident occurred; that the train was running on schedule time, which was about eleven miles an hour; that it was a clear, starlight night; that the engineer and firemen were attending to their regular duties, and keeping a lookout, and that they knew nothing of the accident until they were notified of the same about midnight. A city ordinance prohibiting cars from running at a greater rate of speed than eight miles an hour was specially pleaded in the complaint, and not denied in the answer.

We are now prepared to consider those portions of the charge to which exceptions were taken. The portion first excepted to is as follows: "When men walk laterally upon a railroad track, it is their duty to look and listen for the approach of trains. It is their duty, if they discover a train approaching, if possible, to leave the track. It is their duty to do it. It is not the time for them to remain and speculate about the probabilities of being run over, but if it is in their power to leave the track, it should be done. If they fail to do it when possible, it is negligence on the part of such persons. If you believe from the evidence adduced in this case, that this plaintiff was aware of the approach of that train by any of the modes that I have mentioned,—if he, in fact, knew that the train was approaching,—and that he could have got away from the train, even though it might be by throwing himself prostrate upon the incline of the cut, and he failed to use such means of self-preservation as were obvious and were at hand, then he should be charged guilty of negligence, that contributed to the injury which he sustained." The next assignment of error is so closely akin to the one just stated that it will be convenient to consider them together. It is as follows: "A man cannot go deliberately, and with his eyes

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open, into danger, and then complain of another that he is injured. It is his duty to use all the ordinary means which men do use for their preservation, and if he fails to do that, if there is a choice of ways for him to pass, one a way of safety and one a way of danger, and he is apprised of the situation in that regard, and takes the way attended with danger, he must abide the consequences of his hardihood."

The objection to the first instruction is that it more properly applies to a person walking along a railroad track where there is no grade or obstacle to prevent his escape from an approaching train, and who is injured by collision therewith, than to one walking on a track in a cut through which trains run where escape is difficult, and the perils of one's position, when realized, would be apt to destroy his equanimity of judgment, and thereby increase his liability to injury. Hence, it is claimed, that the instruction, as given, holds the plaintiff to a degree of care and circumspection of conduct that the circumstances of the case do not warrant. The objection to the other instruction is that it assumes that the defendant was not responsible for the perilous position in which the plaintiff was placed when the accident occurred, on the theory that if the plaintiff was familiar with the cut and its surroundings, the time when the trains passed, the difficulty of getting out of their way, and the dangers that would attend the journey through it, and knew there was another road which was safe, and parallel with it, and he chose to pursue the dangerous way, that he should be deemed to assume the risks incident to it, and should take the consequences of his hardihood. This objection includes an instruction not excepted to, but which connects the two already set out, and helps to show their relationship, and is so treated in the briefs. This instruction is as follows: "Furthermore, there is another

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aspect of this case: If this plaintiff was well acquainted with the situation of that railroad, with this cut which has been talked about in the evidence, with the time at which the trains were running, with the narrowness of the cut, and the difficulty of getting out of the way of the train,—I say if you are satisfied that he was apprised of all these things, knew them all, knew the danger that would attend a journey through that cut on the track of the road,—he should be deemed to have taken the risk of the situation, and would have no cause of complaint if he was injured."

It is shown that the locomotive was supplied with the usual appliances for giving warning signals, but the evidence is conflicting as to whether the headlight was lighted; that there was room for a person between the track and the bank of the cut, without coming in collision with a passing train, and that there were places along the bank which one could clamber over; that the cut was in a street through which the railroad ran; and that parallel with it was a road on the bank with which the plaintiff was acquainted, and over which, though uneven, he could have passed with safety; that the track was a tangent for a considerable distance on either side of the cut; that plaintiff was familiar with the cut and its surroundings, and knew and understood the dangers connected with the journey through it, as well as the limited means of escape from an approaching train. The instructions proceed upon the hypothesis that a railroad is a place of danger, and that it is the duty of one venturing upon its track, or a cut through which it passes, which may be used as a pathway, to make vigilant use of his eyes and ears, and that it is his duty, also, to leave the track, if possible, when he discovers a train approaching; and, if he fail to do so and be injured thereby, that he would be guilty of negligence. After this announce-

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ment of the law, the trial court instructed the jury, in effect, as more directly bearing upon the facts of the case at bar, that if the plaintiff knew, while he was on the track, and in the cut where the injury occurred, that a train was approaching,—as by seeing its headlight,—and could have got out of way by the means that were at hand and obvious,—as there was some evidence tending to indicate that he might have done,—and failed to do so, and was injured, that he would be chargeable with contributory negligence. Further, that if the plaintiff was acquainted with the situation of the railroad, and the cut, and was fully apprised of all the dangers that would attend a journey through it, and at the same time knew that there was a choice of ways for him to pass, one a way of safety, and the other of danger, and he deliberately chose the dangerous way, and was injured thereby, he should be deemed to have assumed the risk, and should take the consequences of his conduct.

We do not think the instructions are amenable to the objections raised or that they misstate the facts upon that phase of the law to which they are intended to apply. The vice of the plaintiff's first objection is that it assumes that the instruction applies to a state of facts materially different from those shown to exist herein; that there was no evidence tending to show the approach of the train, or that there was any obvious means of escape from collision available to the plaintiff, and that, without any knowledge of his surroundings, he was suddenly placed in the presence of unlooked-for danger, when prudent action or deliberate judgment is not expected or required. As to the other objection, the instruction only assumes that the defendant is not liable for the injury if the plaintiff was guilty of contributory negligence. It simply goes to the effect that one cannot voluntarily place himself in a place of danger, and then throw the responsibility for the resulting injury upon another.

Opinion of the court—LORD, C. J.

The next instruction assigned as error is the following: "Something has been said, too, with regard to the speed of the train. It is not neglect of the company *per se* to run their trains faster than the ordinance of the city allows. The ordinance of the city imposes a penalty for its violation, but it did not confer upon the plaintiff any right of action as for a private wrong against the company; but the circumstance of the ordinance being violated you can take (consider?) in connection with all the other circumstances of the case upon the question of negligence." The objection to this instruction is that it declares that it is not negligence *per se* for the defendant to run its trains through the town faster than the ordinance allows. The object of the ordinance is for the protection of the public, who have a right to act on the assumption that its requirements will be observed. It does not give a right of action, but imposes a penalty for its violation. A breach of duty in this regard cannot be the foundation of a personal right of action, unless it has caused a personal injury that would not have occurred but for such violation of duty. The failure to observe the statutory duty must be the proximate cause of the injury that followed. The running of a train at a prohibited rate of speed in a town, being unlawful, is, in some sense, a negligent act, but it is only when such acts contribute directly to produce the injury complained of that it can be regarded as having established the defendant's negligence. The failure to observe such statutory duty is sometimes spoken of as "negligence *per se*," but it is said that, "except where the statute itself provides that any injury which is done by a party violating its provisions shall be conclusively presumed to have resulted from the violation, there is scarcely reason in treating such failures to observe statutory duty as negligence *per se*": 16 Am. & Eng. Enc. "Negligence," 420, *et seq.*

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To say that the mere fact of the violation of the ordinance is conclusive evidence of negligence, or is negligence *per se*, without regard to the conduct of the plaintiff, or of the duty imposed upon him under the circumstances, would be to relieve him of the consequences of his acts when they contribute to the injury, and would result in an unjust liability upon the defendant. The rule as stated in section thirteen of Shearman & Redfield on Negligence is, "that the violation of an ordinance should always be deemed presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive." It is perhaps true, when the undisputed facts show that the injury was directly due to, and caused by, the running of the train at a prohibited rate of speed, that such breach of statutory duty should be deemed conclusive evidence of negligence. But the mere fact that the train was running at such rate of speed is not, *per se*, conclusive proof of negligence that will render the company liable, but it is evidence of negligence to be submitted to the jury, and considered with the other evidence in the case. The question is for the jury and not for the court to declare as a matter of law. The fact that the train was running at a greater rate of speed than is allowed by the ordinance the court submitted to the jury, as tending to establish negligence, and in this we do not think it erred.

The judgment must be affirmed.

AFFIRMED.

Statement of the case.

[Argued October 30; decided November 20, 1893.]

BELKNAP v. CHARLTON.

[S. C. 34 Pac. Rep. 753.]

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1. **GENERAL AND SPECIAL APPEARANCE—CODE, §§ 62, 530.**—The “voluntary appearance” mentioned in section 62* of Hill’s Code, is not limited or defined by the terms of section 530* of the Code; the only purpose of this latter section is to define what shall constitute such an appearance as will entitle a defendant to be heard as a matter of right, and to have served on him all papers required by law to be served.
2. **GENERAL AND SPECIAL APPEARANCE—JURISDICTION.**—When a defendant appears in an action or proceeding asking some relief which can be granted only on the hypothesis that the court has jurisdiction, the appearance is general, whether it be by its terms so limited or not; but if granting the relief asked would be consistent with a want of jurisdiction, the appearance may be special without submitting to the jurisdiction for any other purpose.
3. **SPECIAL APPEARANCE—ATTACHMENT—JURISDICTION.**—An appearance in an attachment proceeding by defendants who have not been served with process, moving only to discharge the attachment because the action had been commenced in the wrong county, is a special and not a general appearance, and does not constitute a waiver of process.
4. **SPECIAL APPEARANCE—JURISDICTION.**—In Oregon there is no special provision for dismissing a suit or action because the summons has not been served, and a proper manner of raising the question of lack of jurisdiction not appearing on the face of the complaint is by a special appearance.

APPEAL from Crook: W. L. BRADSHAW, Judge.

This action was commenced by H. A. Belknap, H. P. Belknap, and S. I. Belknap, partners, in the circuit court

*Section 62. From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be deemed equivalent to personal service of the summons upon him. Section 530. A defendant appears in an action or proceeding when he answers, demurs, or gives the plaintiff written notice of his appearance, and until he does so appear he shall not be heard, except * * * when a defendant has not appeared, notice of a motion or other proceeding need not be served upon him, unless he be imprisoned. * * *

Argument of counsel.

for Crook County against C. M. and Mamie Charlton, residents of Morrow County, to recover the sum of sixty-one dollars and twenty cents upon an account for goods, wares, and merchandise sold and delivered, and for services rendered. A writ of attachment was duly issued and served in Crook County by attaching in the hands of one J. F. Moore certain moneys belonging to the defendants, but the summons in the action was not served on the defendants. Some three months after the action was commenced, and the writ of attachment had been served, the defendants appeared specially by their attorney for the purpose of applying to the court to discharge the attachment because the action had been commenced in the wrong county, and because no service had been made upon them, which motion being overruled, judgment was rendered against them by default. They now appeal, claiming that such appearance, being special, gave the court no jurisdiction to render a judgment against them.

REVERSED.

Mr. J. F. Moore, for Appellants.

There are but three ways of appearing in an action declared in our Code, viz., by demurrer, by answer, or by a written notice: Hill's Code, § 530. Section 62 has reference to the jurisdiction, while section 530 relates to service of papers, and there is no connection whatever between them. Such is the conclusion of the late Judge DEADY in considering these very sections: *Lung Chung v. Northern Pac. Ry. Co.* 19 Fed. 254, 10 Sawy. 19. See also *Kinkade v. Myers*, 17 Or. 470; *Powers v. Braly* (Cal.), 17 Pac. 197; *Drake on Attachment* (5th Ed.), § 112; *Glidden v. Packard*, 28 Cal. 649.

Mr. Geo. E. Chamberlain orally (with brief by *Mr. M. E. Brink*), for Respondent.

Argument of counsel.

The only question for the consideration of the court on this appeal, is whether the defendants, by filing their motion to dissolve the attachment in this case, submitted to the jurisdiction of the court, and waived defects and irregularities in the service of summons upon them; or, in other words, whether the filing of a motion to dissolve an attachment in an action, is a general appearance. We take it to be a well-settled principle of law, that any motion that calls into action the powers of a court for any purpose except to decide upon its own jurisdiction is such general appearance: *Wood v. Young*, 38 Iowa, 106; *Cropsey v. Wiggenghorn*, 3 Neb. 116; *Foote v. Richmond*, 42 Cal. 443; *Aultman v. Steinau*, 8 Nev. 112; *Bank of Valley v. Bank of Berkeley*, 3 W. Va. 386; *Coad v. Coad*, 41 Wis. 26; *Caruthers v. Johnson*, 17 S. W. 1088; *Lente v. Clarke*, 1 So. 149; *Sargent v. Flaid*, 99 Ind. 501; *Pry v. Hannibal & St. Joseph R. R. Co.* 73 Mo. 123; *Burdett v. Corgan*, 26 Kan. 102; *Greenwell v. Greenwell*, 26 Kan. 530; *Handy v. Insurance Co.* 37 Ohio St. 366; *Hart v. Smith*, 17 Fla. 767; *Bury v. Conklin*, 23 Kan. 460; *Lampley v. Beavers*, 25 Ala. 534; *Stubbs v. Leavitt*, 30 Ala. 352.

The motion in this case was solely for the purpose of dissolving the attachment for the reasons stated in the affidavit, to wit: That it was a "great injustice and inconvenience" to defendants to be deprived of the use of the money, and that "plaintiffs have not used any diligence at all to procure a judgment in said cause," and that defendants have "had no opportunity to answer the merits therein." No mention was made of want of jurisdiction, and no motion was filed to quash the return of service of summons, or to dismiss the action for want of service.

When a party appears specially to question the jurisdiction of a court he must confine his motion and showing to that subject alone: *Layne v. Ohio River R. R. Co.* 14

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S. E. 123; *Bucklin v. Strickler*, 49 N. W. 371; *Winters v. Means*, 41 N. W. 157; *Kinkade v. Myers*, 21 Pac. 557.

We think the defendants' contention that their motion, and affidavit in support thereof, was a special appearance only, is absolutely untenable, for the reason that in ruling on said motion, the circuit court was not called upon to decide any question of jurisdiction whatever; and further, that defendants by taking this appeal submit to the jurisdiction of the court: *Waggoner v. Fogleman*, 13 S. W. 720; *Dikeman v. Mrotek*, 45 N. W. 118; *Adams Express Co. v. St. John*, 17 Ohio St. 641.

Opinion by MR. JUSTICE BEAN.

1. It is admitted that the voluntary appearance of a defendant in an action is equivalent to the service of a summons, and waives all defects in the process (Code, § 62), but the contention for defendant is that no appearance, except as provided in section 530 of the Code,—that is, either by answer, demurrer, or giving plaintiff written notice,—can be deemed an appearance within the meaning of section 62 of our Code. Section 530 provides, that a defendant appears in an action when he answers, demurs, or gives plaintiff written notice of his appearance, and until he does so appear he shall not be entitled to be heard, or be served with notice of subsequent proceedings in such action or suit, or in any proceeding pertaining thereto, except the giving of an undertaking in the provisional remedies of arrest, attachment, or the delivery of personal property. The arrangement of this section in the Code under the title of "Notices and Service and Filing of Papers," as well as its language, indicates clearly that its only purpose is to define what shall constitute such an appearance in an action as will entitle the defendant to be heard, as a matter of right, and entitle

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him to the service of notice of motions and subsequent proceedings in the action required by law to be served: *Bank v. Rogers*, 12 Minn. 529; *Grant v. Schmidt*, 22 Minn. 1. It was not, we think, intended to define a voluntary appearance within the meaning of section 62, and has no bearing upon the question of jurisdiction. A defendant may appear and submit himself to the jurisdiction of the court in many ways, without either answering, demurring, or giving plaintiff written notice of his appearance. He may do this by appearing in person, or by attorney in open court, by attacking the complaint by motion, or by an application for a continuance, and in many other ways which will readily suggest themselves to one familiar with the course of judicial proceedings. But before he is entitled, as a matter of right, to be heard in the action, or in any proceedings pertaining thereto, or to be served with notice, he must appear in one of the ways provided in section 530. The question before us, therefore, must be determined without reference to that section, which, as we conceive, has no bearing upon the question as to whether a special appearance for the purpose of applying for the discharge of an attachment is a submission to the jurisdiction of the court so as to authorize it to proceed to judgment in the action without the service of summons.*

2. It is claimed by the plaintiffs that while a defendant may appear specially to object to the jurisdiction of the court over him on account of the illegal service of process, (*Kinkade v. Myers*, 17 Or. 470, 21 Pac. Rep. 557,) he must keep out of court for every other purpose, and that any appearance which calls into action the power of

* NOTE.—The conclusion here announced is the same as that of the late Judge DEADY in the Federal Court in considering these same sections of the Oregon Code: *Lung Chung v. Northern Pac. R. R. Co.* 19 Fed. 254, 19 Sawy. 19.—REPORTER.

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the court for any purpose except to decide upon its own jurisdiction, is a general appearance, and waives all defects in the service of process, and many authorities are cited to sustain this position. The principle to be extracted from the decisions on this subject is, that where the defendant appears and asks some relief which can be granted only on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance by its terms be limited to a special purpose or not: *Coad v. Coad*, 41 Wis. 26; *Blackburn v. Sweet*, 38 Wis. 578; *Pry v. Hannibal & St. Jo. R. R. Co.* 73 Mo. 126; *Sargent v. Flaid*, 90 Ind. 501; *Layne v. Ohio River R. R. Co.* 35 W. Va. 438, 14 S. E. Rep. 123; *Handy v. Ins. Co.* 37 Ohio St. 366; *Bucklin v. Strickler*, 32 Neb. 602, 49 N. W. Rep. 371; *Burdette v. Corgan*, 26 Kansas, 102; *Aultman & Taylor Co. v. Steinan*, 8 Neb. 109. This seems to be a reasonable rule, and one which will adequately protect the rights of the parties, and it determines the effect of defendant's appearance from the nature of the relief which he seeks to obtain. If he asks the court to adjudicate upon some question affecting the merits of the controversy, or for some relief which presupposes jurisdiction of the person, and which can be granted only after jurisdiction is acquired, he will be deemed to have made a general appearance, and to have submitted himself to the jurisdiction of the court, and cannot, by any act of his, limit his appearance to a special purpose. But, if granting the relief asked would be consistent with a want of jurisdiction over the person, he may appear for a special purpose without submitting himself to the jurisdiction of the court for any other purpose. It has consequently been held that an attachment and the action out of which it issues, are so inseparably connected that the defendant

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cannot appear and question the validity of the attachment by a traverse of the facts alleged in the affidavit, or by contesting the truth of the grounds upon which it issued, without submitting himself to the jurisdiction of the court in the action, because by so doing the court is called upon to entertain and determine questions which can be considered only after jurisdiction has attached: *Greenwell v. Greenwell*, 26 Kan. 530; *Bury v. Conklin*, 23 Kan. 460; *Wood v. Young*, 38 Iowa, 102; *Duncan v. Wickliffe*, 4 Met. (Ky.) 118. But where a defendant appears, and without questioning the merits of the action, or the truth of the grounds upon which the attachment issued, moves to discharge the attachment for want of the jurisdictional facts to sustain it, he asks no relief the granting of which would be inconsistent with an entire want of jurisdiction over the person, and hence does not appear in the action so as to authorize the court to proceed to judgment against him: *Drake*, Attach. § 112; *Glidden v. Packard*, 28 Cal. 649; *Johnson v. Buell*, 26 Ill. 66; *Bonner v. Brown*, 10 La. Ann. 334.

Now, in the case at bar, the appearance of the defendant was not for the purpose of contesting the truth of the grounds upon which the attachment issued, or the merits of the action, but to vacate the attachment for the reason, as appears from the affidavit accompanying the motion, that the action had been commenced in the wrong county, and that it was a great injustice and wrong to them to have their property thus held under an attachment when there was no means of obtaining jurisdiction over their persons. This appearance was, therefore, not for the purpose of submitting to the jurisdiction of the court, or asking it to entertain or determine any question which could only be considered after jurisdiction had attached, but it was for the sole purpose of objecting to the validity of the attachment for irregulari-

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ties in the proceedings, the granting of which would have been entirely consistent with the claim that the court had no jurisdiction of the person. By their motion to discharge the attachment for the reason stated, the defendants appeared for no purpose incompatible with the supposition that the court had acquired no jurisdiction over them on account of a want of service of the summons, and we therefore think there was no waiver of process. Nothing less than the express language of a statute, or the necessary implication therefrom, or the overbearing weight of authority, will justify a court in holding that a defendant in an action commenced in the wrong county, in violation of section 44 of the Code, could not appear and apply for the discharge of an attachment against his property, for irregularities, without being required to submit himself to the jurisdiction of the court for the purpose of the entire action; and it is not material in such case, whether the motion happened to be well founded or not, but the question is, did it go to the merits, or was it based upon some technical grounds supposed to be sufficient to render the attachment invalid. If a defendant may not thus appear and resist what he supposes to be a wrongful attachment without subjecting his person to the jurisdiction of the court, he must either suffer his property to be held under a pretended attachment for an indefinite time, or waive a statutory right to be sued in the county where he resides or may be found. This the law will not exact or require.

4. It was suggested that the remedy of the defendants in such case is by motion to dismiss the action for want of jurisdiction, but such a motion would be unavailing. The court has jurisdiction of the subject matter, and an action is commenced by the filing of the complaint, and there is no provision of the law authorizing it to be dismissed because the summons has not been served: Code, §§ 51, 59.

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It follows, therefore, that the action of the court below in entering judgment against the defendants without service of process upon them was unauthorized, and the judgment must be reversed. **REVERSED.**

[Argued November 16; decided November 20, 1893.]

DILLON v. HART.

[S. C. 24 Pac. 817.]

1. NOTICE OF MECHANIC'S LIEN — CODE, § 3673. — The notice of lien mentioned in section 3673 of Hill's Code, must not only show, either directly or by necessary inference, to whom the material or labor was furnished, but also that the claimant did in fact do something. *Rankin v. Malarkey*, 23 Or. 593, approved and followed.
2. NOTICE OF LIEN — CODE, § 3673. — A notice of lien in the following language, viz.: "Know all men by these presents, that I, H. E. * * * have, by virtue of a contract heretofore made with partners, * * * who were the contractors and agents of J. D. and C. C., and J. D. and C. C. were the owners and principals in the building and furnishing the material of a certain house, the ground upon which said house was built and material furnished being at the time the property of J. D. and C. C. who caused the said house to be built and material furnished," is insufficient to sustain a lien under section 3673 of Hill's Code, because it does not show to whom the material was furnished, or that any material was furnished at all. *Rankin v. Malarkey*, 23 Or. 593, approved and followed.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

Suit by H. E. Dillon against J. D. Hart and C. C. Newcastle to enforce an alleged lien for material said to have been furnished to Cramer & Krupke, who were erecting a building on the land of the defendants. Decree for plaintiff, and defendants appeal. **REVERSED.**

Mr. Warren E. Thomas (Mr. Frank A. E. Starr on the brief), for Appellants.

25	49
26	117
34	817
37	69
36	49
28	484
25	49
30	577
25	49
148	236

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Mr. Patrick J. Bannon, for Respondent.

Opinion by MR. JUSTICE BEAN.

This is a suit by a sub-contractor to foreclose a mechanic's lien upon the real property of the defendants for labor and material furnished and used in the construction of a building thereon. The portion of the claim of lien material to the question presented on this appeal, is as follows:—

“Know all men by these presents, that I, H. E. Dillon, of the city of Portland, in the county of Multnomah, state of Oregon, have, by virtue of a contract heretofore made with Cramer & Krupke, partners, of Portland, of the county of Multnomah, Oregon, who were the contractors and agents of J. D. Hart and C. C. Newcastle, and J. D. Hart and C. C. Newcastle were the owners and principals in the building and furnishing the material of a certain house, the ground upon which said house was built and material furnished at the time the property of J. D. Hart and C. C. Newcastle, who caused the said house to be built and material furnished.”

This notice of lien is clearly insufficient within the rule announced in *Rankin v. Malarkey*, 23 Or. 593, 34 Pac. 816, 32 Pac. 620, and because it does not state, either directly or by necessary inference, to whom he furnished material, or for whom he furnished the labor for which he seeks to enforce the lien, or, in fact, that he furnished any material or performed any labor on the building of the defendants. Under the provisions of the statute it is essential to the validity of a mechanic's lien that the claim thereof as filed contains a statement of such claim and the person to whom claimant furnished material or for whom he performed labor, and, without such a statement, it is insufficient and cannot be enforced. For these

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reasons the decree of the court below must be reversed,
and the complaint dismissed. **REVERSED.**

[Argued Oct. 31; decided Nov. 20, 1893; rehearing denied.]

KLEINSORGE v. ROHSE.

[S. C. 34 Pac. Rep. 874.]

25	51
28	274
25	51
29	284
25	51
43	577
25	51
38	461
25	51
47	549

JURISDICTION OF EQUITY TO REFORM WRITTEN CONTRACTS.—To justify a court of equity in reforming a written contract, it should clearly appear that there was some relation of trust or confidence between the parties that has been abused, or that there was fraud, or fraud on one side accompanied by mistake on the other, or that the means of knowing the facts were not equally open to both parties. *Archer v. California Lumber Co.* 24 Or. 341, approved and followed.

APPEAL from Multnomah: M. G. MUNLY, Judge.

This is a suit to reform and enforce a written lease of real property. The facts show that the plaintiff, Fred Kleinsorge, on February fifth, eighteen hundred and ninety-two, was the owner and in the possession of a tract of land in South Portland, Oregon, containing four and three hundredths acres, in or near the center of which was his dwelling-house with a path from it to the Macadam Road on the east, and a pipe laid from a spring near the west end of said tract to the house, supplying water for irrigating a garden and for domestic purposes. The plaintiff, Kleinsorge, leased said tract to Joseph Rohse for a term of five years, to be used as a concert garden, and, after the latter had commenced to improve it by building a high board fence around that part lying in front of said dwelling, and to erect a pavilion thereon, he desired an extension of the term, and the plaintiffs thereupon executed and delivered to him the following lease: "This agreement, between Fred Kleinsorge and Katharina

Statement of the case.

Kleinsorge, his wife, of the first part, and Joseph Rohse, of the second part, all of Fulton Precinct, of the city of Portland, Oregon, witnesseth: That the said Fred Kleinsorge and Katharina Kleinsorge, his wife, in consideration of the covenants of the said Joseph Rohse, (his executors or administrators,) doth hereby lease unto the said Joseph Rohse, his executors or administrators, from the fifth (5th) day of February, A. D. eighteen hundred and ninety-two, until the fifth day of February, A. D. nineteen hundred and two,—that is, for the term of ten (10) years,—the following described premises, to wit: Four (4) acres, or less, of ground, and fruit trees thereon, to be used as a pasture or as a concert garden at the discretion of the said Joseph Rohse. The said Joseph Rohse agrees to make room for street purposes, if so directed by the council of the city of Portland, without claiming any damage therefor. The said Joseph Rohse also agrees to pay such an increase of the taxes on said property, which being above and over the amount now paid by Fred Kleinsorge; after the expiration of the first five (5) years, Joseph Rohse agrees to pay all taxes; said Joseph Rohse further agrees to pay such street improvement as may be deemed necessary on the present streets. The rent to be paid at monthly payments of twenty-five (\$25.00) dollars per month for the first three (3) years, and thirty-five (\$35.00) dollars for the remaining seven (7) years. This monthly rent must be paid on or before the twentieth (20th) of each month, or this lease shall be void. And said Joseph Rohse further agrees to return said premises at the expiration of said time in as good order and condition as they are now in, reasonable wear and tear and unavoidable casualties excepted." This was dated February fifth, eighteen hundred and ninety-two, signed by the parties, and duly witnessed and acknowledged. Mr. Kleinsorge, on May second, eighteen hundred and ninety-

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two, went to the mines in Eastern Washington, leaving his wife in possession of the dwelling-house, for whose accommodation the defendant placed locked gates in the high board fence, furnished her with keys thereto, allowed her to use the path from the house across his concert garden to the Macadam Road, and permitted her to occupy the dwelling until February fifth, eighteen hundred and ninety-three, when he placed other locks on the gates, and refused to furnish her with the keys to them, whereupon this suit was commenced to enjoin him from interfering with her possession and to reform the lease.

The plaintiffs allege that it was understood and agreed that said dwelling and enclosed garden, eighty-five by one hundred and sixteen feet, surrounding the house, together with the right of way across the concert garden to the Macadam Road, and the right to use the water from the spring for irrigating said garden and for domestic purposes, should be reserved to them by the terms of said lease; but that the defendant caused the foregoing lease to be prepared, and represented to them that it was in accordance with their agreement, and they, relying upon such representations, were thereby induced to execute it, and did not discover the defects and omissions until just before this suit was commenced; that said lease does not contain all the agreements of said contract, and that they believe the defendant fraudulently obtained their signatures to it well knowing it to be defective. The defendant denied the material allegations of the complaint, but, as the lease failed to describe any property, he admitted that there was a mutual mistake in this regard, and adopted the description of the property as given in the complaint, and prayed that the lease be reformed so as to contain a correct description of the leased premises; and the cause being at issue was tried

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by the court, and a decree reforming said lease as prayed for by the plaintiffs was rendered, from which decree the defendant appeals. MODIFIED.

Mr. James Finley Watson (Messrs. Edward Mendenhall, Edward B. Watson, Benjamin B. Beekman, and Elbert J. Mendenhall on the brief), for Appellant.

Mr. Edward W. Bingham (Mr. Clarence Avery on the the brief), for Respondents.

Opinion by MR. JUSTICE MOORE.

Does the foregoing lease express the intention of the parties to the contract, is the question presented by this appeal. To entitle a party to have a written contract reformed by a court of equity, the complaint must show that some relation of trust or confidence existed between the parties to it, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions were not equally open and accessible to both parties: *Archer v. California Lumber Co.* 24 Or. 341, 33 Pac. 526. The complaint herein is founded upon the alleged fraudulent representations of the defendant, but does not allege that any relation of trust or confidence existed between the parties. In *Hawkins v. Hawkins*, 50 Cal. 558, it was held that where the complaint did not allege that any relation of especial trust or confidence existed between the parties to the contract, or that the means of knowledge as to the terms and conditions of the writing were not equally open and accessible to both parties, a demurrer was properly sustained. ¹

Upon the question of misrepresentations by the defendant as to the contents of the lease, the plaintiffs do not testify that he or any other person told them that it, as prepared, contained all or any of the terms or con-

Opinion of the court—MOORE, J.

ditions agreed upon, and there is not one particle of evidence in the record to support the allegation to that effect in the complaint. The answer, however, having admitted that there was a mutual mistake in the description of the premises, makes it proper to consider the evidence for the purpose of ascertaining the terms and conditions of the contract agreed upon by the parties: 20 Am. & Eng. Enc. Law, 720, and cases cited. The evidence shows that the plaintiffs and defendant, as well as most of their witnesses, are Germans, and that the plaintiffs are old, and do not well understand the English language; that Mr. Kleinsorge went with the defendant to the office of Messrs. Rickard & Ohloff, neither of whom he was acquainted with, where Mr. Rickard prepared but one copy of the first lease at Mr. Kleinsorge's dictation, and delivered it to Mr. Rohse. The date of its execution is uncertain, the plaintiff testifying that it was February fifth, eighteen hundred and ninety-two, while Mr. Rickard, who is not positive, thinks it was some time during the previous month. On the day of its date plaintiff F. Kleinsorge executed and delivered to the defendant an instrument, written in the German language, which being translated, reads as follows:—

“FULTON, Oregon, February 8, 1892.

“I, the undersigned, testify hereby that the first monthly payment of twenty-five dollars between the fifth and twentieth of June begins for the year eighteen hundred and ninety-two between the fifth and twentieth, eighteen hundred and ninety-two; also no payments between the months in this year.

(Signed.)

“F. KLEINSORGE.”

The plaintiff F. Kleinsorge testified that upon consultation with his wife, after the first lease was executed, they concluded that the defendant would be compelled to

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expend large sums of money in preparing the grounds for a concert garden, and that he could not derive any benefit therefrom until this work was completed, and that to aid and encourage him in prosecuting the work this instrument was executed. The defendant testified that the plaintiff, after the lease was executed, offered to pay him seventy-five dollars if he would permit Mrs. Kleinsorge to remain in the dwelling-house and use the small garden for the term of one year, to which he agreed, and that the receipt was given in settlement thereof, and that in pursuance of this agreement he placed gates in the high board fence for her accommodation, and allowed her to occupy the house and garden for one year. The plaintiff further testified that when the defendant desired an extension of the term of the lease, he sent Mr. Ohloff, whose partner had prepared the first lease, to see him about it, and that he told Mr. Ohloff he would not lease the house and garden, and that Mr. Ohloff, who is a surveyor, told him he ought to have the premises surveyed, but because of his lack of means it was not done; that about two weeks after this request was made the defendant's wife notified plaintiff that Mr. Ohloff had come to prepare a new lease of the property, and that he told the defendant and his wife that he would not lease the house and garden. The defendant admits that the plaintiff made this statement, but says he told the plaintiff at the time that he had no use for the property with them in possession of the house, and that this claim had been the cause of their previous trouble.

Mr. Ohloff testified that he copied the description from the first lease, and that, finding it insufficient, he requested the plaintiff to procure his deed, that he might correctly describe the property, but that both parties claimed that it was sufficient, whereupon he wrote it at the dictation of the plaintiff, who told him he was leas-

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ing all the property to the defendant, and when it was completed he read it in English, and explained its terms in the German language; that the plaintiffs thereupon signed it in the presence of the witnesses, and acknowledged its execution. A duplicate copy of the new lease was then prepared and delivered to Mr. Kleinsorge, and the old one destroyed by Mr. Rohse. Mr. Kleinsorge testified that he did not understand the terms of the lease when read by Mr. Ohloff, and Mrs. Kleinsorge testified that she understood only that part of the lease which provided for the payment of rent. Some testimony was given which tended to prove that Mr. Kleinsorge intended, when he rented the property, to go to the mines, and that his wife was expected to live with a married daughter in Portland, Oregon. Several witnesses, most of whom were in the defendant's employ, testified that Mr. Kleinsorge told them that he had rented the whole tract to the defendant. It also appears that Mr. Kleinsorge, after he had leased the property, worked about three weeks for the defendant, assisting him in building fences on the leased premises, for which he made no charge and received no compensation.

Grouping the facts and circumstances, we find the following in support of the plaintiff's contention: The evidence of Mr. Kleinsorge as to the transaction; the fact that he leased four acres or less when he owned more; the circumstance that the defendant placed gates in the high board fence for Mrs. Kleinsorge's accommodation, and permitted her to remain in possession of the house and garden; and that Mr. Kleinsorge, without any compensation therefor, worked for about three weeks assisting the defendant in addition to the donation of three months' rent. Opposed to this we find the testimony of Frank Rickard that the first lease contained no reservation; that the new lease provided for an increased amount of rent,

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contained no reservation, and the strong presumption that it expresses the intention of the parties; the testimony of Mr. Ohloff that no reservation was claimed by Mr. Kleinsorge at the time the lease was executed, and that he told him at that time he was leasing the whole premises; the denial of the defendant, and the testimony of several witnesses that Mr. Kleinsorge stated to them that he had leased to the defendant all his property; and the receipt for seventy-five dollars. The trial court, by seeing the witnesses and hearing them testify, certainly had a better opportunity for judging their character, and the weight of their evidence, than this court can possibly possess from an inspection of the record, and yet we do not think the plaintiffs have established their case by the convincing evidence required in such cases, but, on the contrary, it affirmatively appears from the record that the equities are clearly with the defendant. The evidence does not show that Mr. Kleinsorge had reason to believe or did believe that Mr. Ohloff was acting as his agent, or stood in any confidential relation towards him, or that any misrepresentations were made to him by any person at the time the lease was executed.

2. Every written contract carries the strong presumption that it expresses the terms agreed upon between the parties to it, and ought not to be reformed, except when it clearly and satisfactorily appears that there has been a mutual mistake, or a mistake on the part of the plaintiff, accompanied by fraud upon the part of the defendant, or by such acts on his part as would clearly be inequitable between the parties. Tested by this rule, we do not think the plaintiffs have made the necessary proof to entitle them to the relief sought, and for that reason the decree must be modified in so far as it gave the plaintiffs any reservation in the property leased, or restrained the defendant from occupying any part of it. MODIFIED.

Statement of the case.

[Argued November 22; decided November 27, 1893.]

SHUTE v. JOHNSON.

[8. C. 34. Pac. Rep. 966.]

1. **FRAUD—CANCELLING DEED—FIDUCIARY RELATION OF PRINCIPAL AND AGENT.**—A trustee or agent is bound to entire truthfulness and good faith toward his principal, and if by false representations he induces the latter to sell him property for less than its value, the conveyance will be set aside in equity.
2. **IDEM.**—Where plaintiff listed his land with defendant, a real estate agent, for exchange, and, relying on defendant's representation that certain land of his was worth as much as plaintiff's, exchanged his land therefor, his deed to defendant will be canceled where defendant grossly misrepresented the value of his land; since plaintiff has a right to rely on defendant's representations because of the fiduciary relation existing between them.

APPEAL from Multnomah: M. G. MUNLY, Judge.

This is a suit by Thomas Shute against J. A. Johnson and wife to set aside a deed to real property. The facts show that the plaintiff, on February twentieth, eighteen hundred and ninety-three, was the owner of a tract of land at Clackamas, Oregon, containing about one acre, and also the owner of the undivided one half of a chopmill and machinery thereon, which he desired to exchange for a small farm; and on that day he called upon the defendant, J. A. Johnson, a real estate agent at Portland, Oregon, and listed said property with him for exchange. The defendant, J. A. Johnson, not having upon his list such property as the plaintiff desired, offered of his own property four lots in South Baker, Baker County, one lot in Steamboat Addition to Yarrow, Coos County, Oregon, and one lot in Port Discovery Addition, Jefferson County, Washington, in exchange for that of the plaintiff's, which offer was accepted, and the deeds thereto were on the next day duly executed

Opinion of the court—MOORE, J.

and delivered. The plaintiff alleges that his property was worth nine hundred dollars, and that the said defendant represented to him that the Baker County lots were worth four hundred dollars, and those in Coos County and Washington two hundred and fifty dollars each, while in fact the four lots in Baker County were worth but one hundred dollars, and the other two ten dollars each; that all said representations were false and fraudulent, and were made by the defendant knowingly for the purpose of defrauding him; and that, relying thereon, and being deceived thereby, he was induced to convey his land to the defendants in exchange for said lots. He further alleges that about four weeks thereafter, the plaintiff and his wife tendered to the defendants their deeds, duly executed, conveying said lots to them, and demanded a reconveyance of the property in Clackamas; and upon the refusal of the defendants to comply with such demand, this suit was commenced, in which the plaintiff prays that the deed to said tract be set aside. The defendant, after denying the allegations of the complaint, alleged that the lots conveyed by him to the plaintiff were of the value of nine hundred dollars, and denied that the property in Clackamas was of greater value than seven hundred dollars. The cause was tried before the court, and a decree rendered as prayed for, from which the defendant appeals.

AFFIRMED.

Mr. William M. Cake (*Mr. Harry M. Cake* on the brief), for Appellant.

Messrs. Campbell and Dolson, for Respondent.

Opinion by MR. JUSTICE MOORE.

The defendant contends that, admitting he made representations as to the value of his property as alleged

by plaintiff, they were mere expressions of opinion not amounting to a warranty, upon which the plaintiff had no right to rely, and for any damages arising therefrom, equity will not afford relief. The law is well settled that where there is no relation of trust or confidence existing between the parties, a mere false representation of value by a vendor, where no warranty is intended, is no ground of relief to the purchaser: 2 Kent's Com. 845; 1 Bigelow on Fraud, 4191; *Medbury v. Watson*, 6 Met. 259, 39 Am. Dec. 726; *Rockafellow v. Baker*, 41 Pa. St. 321, 80 Am. Dec. 624; but if the representations were intended to be the statement of a fact, to be understood and relied upon as such, relief will be granted to the purchaser who has been injured thereby, and the question should be left to the jury to say whether the representations were mere expressions of opinion as to value or the statement of a material fact: *Homer v. Perkins*, 124 Mass. 433, 26 Am. Rep. 677. If the value of property can be ascertained by ordinary inspection, the maxim *caveat emptor* applies, but such maxim does not apply when any particular skill is required to ascertain it, and affirmations of value in such cases may be relied upon. Where a person makes an affirmation of value which is the inducement to a purchase, within the principle of all the decisions it is a warranty; or, where statements of value are attended with statements as to the elements that go to make up the value, which are false, they are not to be treated as statements of opinion, but of material facts: *Van Epps v. Harrison*, 5 Hill, 70, 40 Am. Dec. 314; *Hubbell v. Meigs*, 50 N. Y. 480. In this case we find that the plaintiff had never seen any of these lots, all of them being more than one hundred miles from Portland, Oregon; that he declined to act upon defendant's suggestion, who advised him to inquire of a former owner of one of the lots then in the city, and of another, also in the city, who was said

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to be acquainted with the Yarrow property, as to the value of such lots, but accepted as true the representations of defendant in relation thereto, although it appears he had no prior acquaintance with him. The evidence, while conflicting, shows that the lots are not worth much more than the amount claimed by the plaintiff, and that their value is grossly inadequate as a consideration for the property received in exchange for them.

The plaintiff testified that at the time the trade was consummated the defendant represented to him that the lots in South Baker were worth one hundred dollars each; that he had sold lots adjoining them for that amount in cash; that he would not take ninety-nine dollars for a single lot, but being in need of money, he would take one hundred dollars apiece for them; that the lot at Port Discovery was worth two hundred and fifty dollars, but that this amount could not probably be obtained for it at that time, as the mill at that place was idle, but that within one year it could be sold for that amount; that the lot in Steamboat Addition to Yarrow was worth two hundred and fifty dollars, making in all a value of nine hundred dollars, and that he asked the defendant if the lots were worth that sum, and he assured him that they were. The defendant testified that he never made any representation to the plaintiff in relation to the value of any of said lots; that he told him he had never seen either of them; that he offered to exchange them for the plaintiff's property, which he had never seen, and the plaintiff accepted the offer; that when plaintiff's deed was presented for delivery it expressed a consideration of nine hundred dollars, and that he made his deeds to express the same amount, by placing in the deed of the South Baker lots a consideration of two hundred and fifty dollars; that he did not tell the plaintiff he had sold any lots in South Baker for one hundred

Opinion of the court — MOORE, J.

dollars in cash, but that he had traded lots there for what he considered a value of one hundred dollars each. The plaintiff further testified that he owed the defendant a commission of fifty dollars for securing the sale of another tract of land, and he desired him to accept some of these lots in payment thereof, but that the defendant replied to the proposition by saying "I would not give fifty dollars for the whole damned lot." The plaintiff had listed his property with defendant for exchange, and by thus creating him his agent for that purpose established a relation of trust and confidence between them, and it became the duty of the defendant, so long as this relation continued, to correctly inform the plaintiff as to the character and value of the property offered; and this relation did not cease when the defendant offered his own property in exchange for that of the plaintiff. To hold that this relation between them had terminated when the defendant offered to trade his own property would be to hold that any person acting in a fiduciary capacity, when he, on his own account, and for his own benefit, treated with his principal or *cestui que trust*, might rob him with impunity. Such is not the law, and this fiduciary relation furnishes an exception to the general rule, that the affirmation of value of the property made by a vendor to secure a sale is but the mere expression of an opinion, and upon which the vendee cannot rely, because it is customary in selling property to make such statements of overvaluation. Whether there was a warranty of value or not has no application to this case, since it was the duty of the defendant to show that he acted in perfect good faith, and rendered a just equivalent for the property he received from the plaintiff. His acts cannot be justified by showing that he gave property of the value of one hundred and twenty dollars in exchange for that of the value of nine hundred dollars.

The decree will therefore be affirmed. AFFIRMED.

Statement of the case.

[Argued October 16; decided November 27, 1893.]

RE FISHER'S ESTATE.¹

KOEHLER v. MCCAMANT.

[S. C. 34 Pac. Rep. 1024.]

1. CHATTEL MORTGAGES—CHANGE OF POSSESSION.—A mortgage of a stock of goods was filed as soon as made, and the mortgagees' agents, who occupied the other side of the same building as the mortgagor, took possession, and put in charge a man who hired the mortgagor to help him, as clerk. New books were opened, and all moneys received, after payment of running expenses, were applied on the mortgage debt. The mortgagor's name on the window was not erased. *Held*, that there was a change of possession, as against subsequently attaching creditors.²
2. CHATTEL MORTGAGES—DESCRIPTION.—The return of the mortgagor's assignee, to whom the stock of mortgaged goods was turned over by consent, showing that he sold more articles of some kinds than were described in the mortgage, does not show that the description in the mortgage was inadequate as against subsequently attaching creditors, there being no averment or proof that the mortgagor had any goods other than those described in the mortgage.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

The object of this proceeding is to determine the order in which the proceeds of the sale of certain property, made under an assignment for the benefit of creditors, shall be distributed. The facts, in substance, are that on the twenty-eighth day of May, eighteen hundred and ninety-one, B. W. Fisher, a music dealer of Portland, being indebted to Koehler & Chase, music dealers in San Francisco, made a promissory note, payable to their order on demand, and, to secure the payment of the same, executed and delivered a chattel mortgage on the stock

¹ This case is republished with a valuable note on the subject of change of possession of mortgaged property in 38 Central Law Journal, 79.—RE-PORTER.

² See the case of *Pierce v. Kelly*, *post*, for a discussion of this same question.—RE-PORTER.

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of goods in his store, and the same was immediately filed in the proper office; that Winter & Harper, as the agents of Koehler & Chase in these transactions, on the same day took possession of the store and said stock of goods and put Mr. W. S. Geary in charge. On the first day of June, eighteen hundred and ninety-one, the said B. W. Fisher made to the order of Wallace McCamant a demand promissory note for the sum of five hundred dollars, upon which, on the second day thereafter, he began an action, and at the same time sued out a writ of attachment and delivered the same to the sheriff, who attached the said stock of goods and took it into his possession. Subsequently, but on the same day, J. H. Robbins brought an action against the said B. W. Fisher on two promissory notes for four hundred dollars and three hundred dollars, respectively, given by Fisher to him, and sued out a writ of attachment, under which the sheriff again attached the same stock of goods. Immediately thereafter Koehler & Chase placed a copy of their mortgage in the hands of the sheriff with instructions to foreclose it. McCamant and Robbins recovered judgment in their respective actions, and shortly thereafter Fisher made a general assignment for the benefit of his creditors. Thereupon the parties entered into a stipulation that the assignee should take possession of and sell the said stock of goods, and return the proceeds thereof into court, which being done, the assignee reported to the court that he was unable to determine the order of distribution of such proceeds, and prayed that the claimants should be required to come before the court, and have their priorities settled and determined. Upon the court so ordering, McCamant and Robbins answered separately, alleging that the mortgage was fraudulent and void as against their respective claims; that it covered different property from that sold by the assignee; that possession

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was not taken under it, and that the liens acquired by each of said attachments were the first liens on the property sold, and entitled to be first paid out of the proceeds of the sale.

Upon issue being joined, the matter was referred to Francis S. Chamberlain, Esq., as referee, and who found, in effect, that the mortgage was valid and a first lien on the property, which finding the court sustained, and rendered a decree in accordance therewith. Wherefore this appeal by McCamant and Robbins.

AFFIRMED.

Messrs. Wallace McCamant and Harrison G. Platt (Messrs. Geo. H. Durham and Zera Snow on the brief), for Appellants.

Mr. Frederick R. Strong, for Respondents.

Opinion by MR. CHIEF JUSTICE LORD. .

The appellants contend that there was no such change in the possession of the property as the law contemplates, and, as a consequence, that the mortgage was not valid against attaching creditors. It is shown by the evidence that Fisher occupied with his stock of goods, one side, and Winter & Harper with their stock of goods, the other side, of the same store building; that Fisher, as already stated, gave to Koehler & Chase the chattel mortgage in question, prepared in the common form, and that the same was immediately filed. Upon the assumption, probably, that the retention of the stock of goods by the mortgagor might induce other creditors to raise some question as to the validity of the mortgage, Winter & Harper, as agents of Koehler & Chase, took possession of the said goods, and put Mr. Geary in charge, who hired Fisher to assist him as clerk. New books were opened, in which to keep an account of the business, and all

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moneys received on sales (no credit being given) were applied to the indebtedness of Koehler & Chase, except such amount as was applied in payment of necessary running expenses. The stock was not replenished, except perhaps, by the purchase of a few strings, and the receipt of some few goods which had been ordered prior to the date of the mortgage. As a business sign, Fisher's name was lettered on the window, which was not erased therefrom when he delivered the possession of his stock of goods to the agents of Koehler & Chase.

The fact that Fisher served as clerk after Mr. Geary was put in possession of, and assumed control over, the goods and business, under these circumstances, is relied upon to show that there was no actual change of possession. There are cases, without doubt, which hold that it is not generally competent for a mortgagee to leave the goods mortgaged in the possession of the mortgagor as his agent, or to make the clerk of the mortgagor his agent to sell them, without any announcement or sign of a change of ownership, as the cases cited by counsel indicate: *Steele v. Benham*, 84 N. Y. 634; *Doyle v. Stevens*, 4 Mich. 87. These cases consider that possession under such circumstances is merely constructive or legal, and does not import that actual change of possession which the statute contemplates. The relevancy of this principle depends upon the facts to which it is to be applied. We may premise that it is not necessary that the mortgaged goods must be delivered to the mortgagee in person, but that delivery to a third party as his agent is equally effective as constituting an actual change of possession. In the case at bar, neither the mortgagor nor his clerk was left in the possession of the goods as agent for the mortgagees, but a third party, as their agent, took possession of such goods, and remained in the continued possession of the same until ousted by the sheriff under the attachment proceed-

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ings. There is a marked difference, as indicating a change in the possession of the property, between a mortgagee, or a third party as his agent, taking possession of mortgaged goods, and such mortgagee leaving the same in the possession of the mortgagor or his clerk as such agent. In the nature of things, when there has been delivery of the mortgaged goods, and an acceptance of them by a third party as such agent, his possession, so long as it continues, is actual and exclusive for the mortgagee. Nor is it necessary that there should be any removal of the goods to indicate such change of possession; for the taking possession and assuming control over the property by such agent is an outward act, or visible sign, of actual change of possession. Hence the possession of Mr. Geary as agent of Koehler & Chase was not constructive or legal, but imported an actual change of possession. This being so, the mere fact that the mortgagor, Fisher, was employed as clerk, did not oust the mortgagees of their possession, or operate to restore the possession to the mortgagor. For, certainly, if they were in possession, or Mr. Geary as their agent, the fact of his employment is not an *indicium* of ownership, and does not constitute such a concurrent possession as the law condemns. In such case his employment in the capacity of a clerk indicates the changed relation he occupies to the property.

The case of *Wilcox v. Jackson*, 7 Colo. 525, 4 Pac. Rep. 966, replied upon, is not in conflict with this principle, upon its face. There the mortgagee, not intending to devote his time to the business, placed in charge a clerk of the firm that gave the chattel mortgage, and he remained in possession and assumed control over the goods and business, so that his appearance indicated no change. If the mortgagee himself had taken charge of the goods and business, or by some third party as his agent, the change in the possession would have been visible and

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accompanied with the usual *indicia* of ownership, although he might have employed a clerk of the firm to assist him in the management of the business. But here Mr. Geary was openly placed in charge, and carried on the business, which he could not do without causing a visible change in the possession of the property. His appearance in the store and in the management of the concern, under such circumstances, indicated that the goods had changed hands,—that there was an actual and visible change of the possession, such as would apprise the community or the creditors of the mortgagor of such change. We do not think, therefore, the fact that the mortgagor was employed as clerk in the store, notwithstanding the omission to erase his name from the window,—which the evidence indicates was an oversight,—can be taken as conclusive evidence of fraud, or justify us in finding fraud, when the *bona fides* of the indebtedness is unquestioned, when the chattel mortgage was regular in form and duly filed in the proper office before either appellant took any steps to reduce his claim to a judgment, and prior to Mr. McCamant obtaining his note, and when the possession taken and maintained was open and actual, and in our judgment, sufficient to give notice to all concerned.

2. The next contention is, that the description of the property in the mortgage is insufficient in law, as against the attaching creditors. This objection is based on the suggestion that the return of the assignee shows that he sold more articles of some of the kinds described than the inventory specified. But there is no evidence to sustain such suggestion. The mortgage undertakes to cover all the goods in the store, and to enumerate them in the inventory attached. It may be true that there were some articles of the stock omitted by mistake from the inventory, and to that extent, if we assume the return to be

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correct and to differ from such inventory, there would be a discrepancy between the return and the articles mentioned in such inventory. But, if this were so in fact, there is no evidence of it. The mortgagees took possession of the store and the goods contained therein, which the mortgage purports to cover, and all the various articles of which it described by enumeration. The assignee sold the stock, and returned the proceeds into court for distribution. The evidence shows that the stock of goods he sold is the stock mortgaged, and there is no evidence to show there was any discrepancy, or that the mortgagee had any other goods in the store than those specified in the mortgage. If there was, the report of the assignee, or his inventory, should have been submitted in evidence and shown to be correct. Without such showing, we cannot assume his inventory is absolutely correct, or consider it for the purposes suggested. He is as liable to make mistakes as were the parties who made the inventory attached to the chattel mortgage. The necessity, therefore, for the proof of the facts upon which the suggestion is based, is too obvious for any further comment. There is no evidence, nor is there any claim that Fisher had other property than the goods in the store and in controversy. We conclude, therefore, that the goods described in the mortgage was the same stock of goods which the mortgagee took possession of, and which the assignee sold.

From these views, it results that the decree must be affirmed.

AFFIRMED.

Statement of the case.

[Argued October 9; decided November 20, 1893; rehearing denied.]

THE WILLAPA.

PORTLAND BUTCHERING CO. v. THE WILLAPA.

[S. C. 34 Pac. Rep. 689.]

1. ADMIRALTY—CONSTITUTIONAL LAW—JURISDICTION OF STATE COURTS TO ENFORCE MARITIME LIENS—CODE, § 3690.—State courts have no jurisdiction to enforce by proceedings *in rem* liens for supplies furnished to a vessel in her home port, since such contracts are maritime, and the district courts of the United States have exclusive jurisdiction thereof under the Revised Statutes of the United States, § 563, clause 8, and § 711, clause 3, which are a re-enactment of the ninth section of the Judiciary Act of 1789.
2. IDEM.—State legislatures may create liens on vessels for supplies or demands, as has been done by section 3690 of Hill's Code, and may also provide for their enforcement by proceedings *in rem*; but whenever the liens so created arise out of maritime contracts, the parties must seek their remedy in the federal courts to which exclusive jurisdiction in admiralty and maritime case has been confided by the constitution of the United States, article III., § 2. State legislatures have power to create maritime liens, but not to provide for their enforcement.*

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This is a proceeding *in rem*, under section 3690 of Hill's Code, brought by The Portland Butchering Company against the steam propeller Willapa, her tackle, apparel, and furniture, to enforce a lien for supplies furnished the vessel in her home port. The boat having been seized by the sheriff pursuant to the provision of section 3694 of Hill's Code, Frederick R. Strong, as claimant, filed an undertaking under section 3698, and

*NOTE.—In the case of *The Victorian*, 24 Or. 121, a proceeding *in rem* under sections 3690–3694 of Hill's Code, to enforce a lien for materials used in constructing a vessel was sustained, such a contract not being maritime.—REPORTER.

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obtained her release. A demurrer to the complaint having been overruled, and judgment rendered against the sureties, the claimant Strong appeals on the ground that the circuit court for Multnomah County had no jurisdiction of the subject of the action.

REVERSED.

Mr. Chas. E. S. Wood (*Messrs. Geo. H. Williams, Stewart B. Linthicum, and J. Couch Flanders* on the brief), for Appellant.

Mr. Chas. Jones McDougall, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

The only question raised by this appeal is, whether state courts have jurisdiction to enforce, by a proceeding *in rem*, a lien given for supplies furnished a domestic vessel in her home port. The contention for the defendant is that a proceeding of this character, brought against the vessel by name, which seeks to condemn and sell her to satisfy a lien given by the state for supplies furnished her, is exclusively within the admiralty jurisdiction of the federal courts. The constitution of the United States ordains that the "judicial power shall extend to all cases of admiralty and maritime jurisdiction": Article III., § 3. By force of this provision the statutes of the United States provide that the district courts of the United States shall have exclusive jurisdiction of "all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, when the common law is competent to give it: Revised Statutes of the United States, § 563, clause 8; *id.* § 711, clause 3. Under these provisions the state courts are excluded from taking jurisdiction of civil maritime cases,

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except so far as common-law remedies are saved to suitors. The principal subjects of admiralty jurisdiction are maritime contracts and maritime torts: *The Belfast*, 7 Wall. 637. Contracts for repairs and supplies furnished a vessel in her home port have long been recognized as maritime contracts, and admiralty jurisdiction over them frequently exercised and sustained: *The General Smith*, 4 Wall. 443; *Peyroux v. Howard*, 7 Pet. 341; *The Steamer Lawrence*, 1 Black, 529; *The Lottawanna*, 21 Wall. 580. It results, therefore, that a cause of action founded on such a contract is a "civil cause of admiralty and maritime jurisdiction," and exclusively cognizable in the federal courts, except in so far as the saving clause preserves to the suitor a common-law remedy as to the same cause of action.

It is true that no maritime lien arises on a contract for supplies furnished a vessel in her home port. Under the general maritime law a lien attaches for supplies furnished a vessel in any other than her home port, on the presumption that such supplies are furnished upon the credit of the vessel herself; but no lien, under such law, attaches for supplies furnished a vessel in her home port, as in that case the presumption is that the credit is given to the owner or master, and not to the vessel. In view of this state of the maritime law, the state legislatures passed laws, which, among other things, give to material men a lien upon a vessel for supplies furnished in her home port, and provide for a proceeding *in rem* against the vessel. Such is the boat lien law of this state: Hill's Code, §§ 3690-3706. In the absence of such local laws, the jurisdiction of admiralty and the state courts to enforce such contracts is concurrent. In either tribunal an action *in personam* may be brought upon them; in the federal courts, because they are maritime, and in the state court, because actions *in personam* and by proceedings in

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attachment are common-law remedies. But neither court could exercise jurisdiction to enforce such contract by a proceeding *in rem*, because in the former there was no maritime lien, and in the latter for the reason that a proceeding *in rem* is not a common-law remedy, nor is the common law competent to give it. When a lien is given by the general maritime law, it is beyond question that a proceeding *in rem* is within the exclusive cognizance of the admiralty courts; but, as no maritime lien arises from a contract for supplies furnished to a domestic vessel, there is no lien to enforce by a proceeding *in rem*, unless it be given by a local or state law. Unless, therefore, there is a lien derived from either the maritime or local law, there can be no proceeding *in rem*. A lien is the foundation of such proceeding; so that, while a contract for supplies furnished a vessel in her home port is a maritime contract, over which admiralty has jurisdiction, yet there is no foundation for a proceeding *in rem* upon it, unless there is a lien created and given by the state law. It is not the fact that a lien exists by the local law, but the fact that the contract is maritime, which gives the federal courts jurisdiction. The state cannot confer jurisdiction upon them, nor create maritime liens so as to have that effect; but courts of admiralty, finding such liens to exist by force of the state law, and having jurisdiction of the contract upon which they are based, have given effect to them by applying the appropriate remedy peculiar to such courts. But it is said that the lien is a right of property, and not a mere matter of procedure, and that if the state has the power to create liens on such contracts, it ought to be competent to provide a mode for their protection, as by the proceeding *in rem*. It is, without doubt, ordinarily true that where there is the power to create a right, there is also the power to provide a remedy. But, where the contract is maritime, the juris-

diction of admiralty is exclusive under the judiciary act, except so far as common-law remedies are saved. The proceeding to enforce a lien is not a common-law remedy. When, therefore, the contract being for supplies furnished a domestic vessel, is maritime, though the state may give a lien upon the vessel, it cannot provide a remedy *in rem* to enforce it, within the saving clause of that act.

How the exclusive jurisdiction of the federal courts is reconcilable with the authority of the state to create such liens, is not easy of solution. "It is a question," RYAN, C. J., said, "with which the state courts have no concern." *Weston v. Morse*, 40 Wis. 455. However that may be, the exclusive jurisdiction to enforce such liens by a proceeding *in rem* has been often asserted and sustained by the federal courts. In *The Lottawanna*, 21 Wall. 580, the doctrine of the exclusive jurisdiction in the district courts of the United States was declared in the most emphatic terms. The court says: "It seems to be settled in our jurisprudence that, so long as congress does not interpose to regulate the subject, the rights of material men furnishing necessities to a vessel in her home port may be regulated in each state by state legislation. State laws, it is true, cannot exclude from the domain of admiralty jurisdiction, the contract for furnishing such necessities, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the district courts of the United States, having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws." While it is true there are

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some text writers who declare that such liens can be enforced by the state courts by a proceeding *in rem*, under authority of state statutes, (Abbott, Shipping, 143, note 3; 1 Parson's Maritime Law, 501, note 2,) and there are also some expressions by the supreme court of the United States from which the same view may be implied (*Norton v. Switzer*, 93 U. S. 365-6; *Johnson v. Chicago & Pacific Elevator Co.* 119 U. S. 388, 399, 7 Sup. Ct. Rep. 254,) yet we think the doctrine must be regarded as settled that liens granted by the state to material men for necessary supplies furnished a vessel in her home port are valid, though the contract to furnish the same is a maritime contract, and that they can only be enforced by proceeding *in rem* in the district courts of the United States: *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624, 644; *Edwards v. Elliott*, 21 Wall. 532, 556; *The Madrid*, 40 Fed. 680; *U. S. v. B. & H. C. Ferry Co.* 21 Fed. 331; *Clyde v. Transportation Co.* 36 Fed. 503; *The Guiding Star*, 18 Fed. 263; *The John Farron*, 14 Blatchf. 26.

Rule twelve of the supreme court practice, as amended in eighteen hundred and seventy-two provides that, "In all suits by material men for supplies or repairs, or necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner *in personam*." In *The Lottawanna*, 21 Wall. 580, it was held that this amendment restored the rule of eighteen hundred and forty-four, or rather as Mr. Justice BRADLEY said, in stating its effect, "we have made it general in its terms, giving to material men in all cases their option to proceed either *in rem* or *in personam*. Of course, this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel." And in another part of the opin-

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ion, he says: "As to the recent change in the admiralty rule referred to, it is sufficient to say that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure." As a reason for the rule, or for the enforcement of state liens where the contract is maritime, it is said in *The Steamer St. Lawrence*, 1 Black, 530, that "The state lien was enforced, not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power which the court might lawfully exercise for the purpose of justice, where it did not involve controversies beyond the limits of admiralty jurisdiction." The state law does not confer jurisdiction on the federal court, but, as was said in *Ex Parte McNeil*, 13 Wall. 243, "A state law may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction; that exists already, and it is invoked to give effect to the right by applying the appropriate remedy." But, whatever may be the origin of the practice, it seems to be well settled that, when the contract is maritime, and the maritime law does not give a lien, as for necessary supplies or repairs to the vessel in her home port, state statutes cannot confer jurisdiction by a proceeding *in rem*. In the majority of the state courts where the question has arisen, the decisions are adverse to jurisdiction to proceed *in rem*: *Warren v. Kelly*, 80 Me. 512, 15 Atl. Rep. 49; *The Petrel v. Dumont*, 28 Ohio St. 602; *Weston v. Morse*, 40 Wis. 455; *Sheppard v. Steel*, 43 N. Y.

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52; *Pool v. Kermet*, 59 N. Y. 554; *M. B. & L. Association v. Robertson*, 65 Ala. 382; *Waggoner v. St. John*, 10 Heisk. 503; *Walters v. The Mollie Tozier*, 24 Iowa, 192; *Marshall v. Curtis*, 5 Bush, 615; *Dever v. The Hope*, 42 Miss. 715; *Crawford v. The Caroline Reed*, 42 Cal. 469. *Contra*: *Donnell v. The Starlight*, 103 Mass. 230; *Southern Dry Dock Co. v. Gibson*, 22 La. Ann. 623; *Williamson v. Hogan*, 46 Ill. 504; *Mitchell v. The Magnolia*, 45 Mo. 67; *Atlantic Works v. Tug Glide*, 157 Mass. 527, 33 N. E. Rep. 163. In view of the authorities, we feel bound to hold that the statute, so far as it authorizes a proceeding *in rem* in the courts of this state for the enforcement of a lien for necessary supplies furnished a vessel in her home port, is in contravention of the laws and the constitution of the United States, and invalid, and, as a consequence, that the judgment in this case must be reversed.

REVERSED.

[Argued October 11; decided November 27, 1893; rehearing denied.]

BARTHOLOMEW v. AUMACK.

[S. C. 34 Pac. Rep. 817.]

1. **CONTRACT — BROKER — EQUITY.**— Under a contract by a real estate broker for the sale of lands, providing that when the owner has received a designated amount in actual cash from the sale of the property, if realized during the existence of the contract, he will convey to the broker all the unsold lots and all the notes wholly or partly unpaid, the broker may recover from the owner an amount advanced to prevent a forfeiture of the contract after the latter has received in actual cash the full sum contracted for within the time agreed upon, where a total failure of the title after full performance of the agreement precludes the broker from selecting any property in repayment of the amount advanced.
2. **CONTRACTS — BROKERS.**— Under an agreement by a real estate broker to clear certain land, survey and plat it into lots, and advertise and sell it, for a commission of ten dollars upon each lot sold, providing that in case of eviction as the result of a pending action the owner shall pay him a designated sum for clearing the land, after which the con-

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tract is to become void, the broker cannot recover the expenses of surveying when the action results in eviction.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by D. Bartholomew and James Hyland against Lyle N. Aumack, E. H. Averill, and James G. McCallum, for an accounting. The facts show that on August twenty-sixth, eighteen hundred and ninety, the defendants claimed to be the owners of a tract of land in Multnomah County, Oregon, containing five and ninety-two one-hundredths acres, which land was also claimed by one Samuel Coulter, who had commenced an action in the circuit court of said county against the Portland Trust Company, involving the title to said property; that on said date a written contract was entered into between the parties to this suit by the terms of which the plaintiffs agreed to clear said land of brush, survey, and plat into lots and blocks, advertise and sell it, within six months from the date thereof, for cash down or on time, taking installment notes on time sales, payable to the defendants, who were to execute warranty deeds to cash customers, and bonds for deeds in double the amount of the purchase price to purchasers on credit. All notes taken and moneys received, except a commission of ten dollars upon each lot sold, were to be delivered to the defendants, and when the sum of seven thousand four hundred and four dollars and forty-one cents should be collected in actual cash, on account of sales, the lots and blocks then unsold were to be conveyed, and all notes wholly or in part unpaid were to be assigned to the plaintiffs, who were to pay the expense of conveyancing, and all taxes upon the property or notes given therefor; but if the defendants did not receive the full purchase price in cash or notes, within six months, and realize two thousand dollars on such sales or notes, then, by giv-

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ing the plaintiffs notice of their election, they could declare all rights under said contract forfeited, and, when so declared, the ten dollars commission should be a full compensation for services in making such sales; and in case no notice be given, the balance of the purchase price should be payable in eight months thereafter, with interest thereon at the rate of eight per cent per annum. It was further agreed that if the defendants should be evicted as a result of a judgment in the said action of *Coulter v. Portland Trust Co.*, then the defendants were to pay the plaintiffs forty dollars per acre for clearing said land, and the contract between them was to become void. The plaintiffs cleared said land, and paid therefor two hundred and forty dollars; surveyed and platted it into thirty-seven lots, and paid on account thereof, and for taxes and other expenses in making sales, one hundred and fifty-eight dollars and thirty-five cents; and on February twenty-sixth, eighteen hundred and ninety-one, the defendants not having received two thousand dollars in cash within the six months, the said plaintiffs paid them five hundred and forty dollars to complete this amount, and thereupon the contract was extended from time to time until December first, eighteen hundred and ninety-two. The plaintiffs, prior to the last mentioned date, had sold all said lots, and delivered to the defendants the proceeds thereof, and, on December first, eighteen hundred and ninety-two, they had collected eight thousand one hundred and nine dollars and fifty cents, which included the interest on the balance due February twenty-sixth, eighteen hundred and ninety-one, and the payment of the five hundred and forty dollars made by the plaintiffs.

In the action of *Coulter v. Portland Trust Co.* judgment was rendered in favor of the defendant, which, upon appeal to this court, was, on April fourteenth, eighteen

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hundred and ninety-one, reversed, and a new trial ordered: 20 Or. 409, 26 Pac. 565. A mandate was entered in the court below, and, while said action was there pending, a suit was brought in said county to stay the proceedings at law, and a decree rendered dismissing the bill, which on appeal to this court was, on October thirty-first, eighteen hundred and ninety-two, affirmed: *Portland Trust Co. v. Coulter*, 23 Or. 131, 31 Pac. 280. The defendants herein, subsequent to October thirty-first, eighteen hundred and ninety-two, made a settlement with Samuel Coulter, whereby they, in consideration of one dollar, conveyed to him sixteen lots that had been forfeited by the purchasers; and Coulter, in consideration of six thousand dollars, conveyed to them twenty-one lots that had not been forfeited. Thereafter, and prior to December first, eighteen hundred and ninety-two, in response to plaintiffs' request for a settlement, defendants offered to pay plaintiffs the sum of two hundred and forty dollars on account of clearing said land, and refused to make any other settlement, whereupon this suit was instituted on December twenty-ninth, eighteen hundred and ninety-two. On January fourth, eighteen hundred and ninety-three, in the action of *Coulter v. Portland Trust Co.* judgment was rendered in favor of the plaintiff, and for the possession of said tract, and the defendants, as a result thereof, were evicted therefrom, which fact is alleged in their answer to the complaint herein. The cause was referred to John B. Cleland, Esq., to take the testimony and report the facts and his conclusions of the law thereon, and he found that the plaintiffs were entitled to recover two hundred and forty dollars and costs, and this report, having been affirmed by the court, and a decree rendered in accordance therewith, the plaintiffs appeal.

MODIFIED.

Opinion of the court—MOORE, J.

Mr. Geo. A. Brodie (Messrs. John M. Gearin, Julius Silvestone, and Daniel R. Murphy on the brief), for Appellants.

Mr. Edward B. Watson (Messrs. James F. Watson and Benjamin B. Beekman on the brief), for Respondents.

Opinion by MR. JUSTICE MOORE.

The plaintiffs contend that they are entitled to recover from the defendants, in addition to the amount allowed them by court, the following: For surveying and other expenses, one hundred and fifty-eight dollars and thirty-five cents; and for money advanced on the contract, five hundred and forty dollars.

It was necessary to make a survey and plat of the land, and advertise the property, before any sales could well be made, and as the plaintiffs agreed to do these things with full knowledge that the contract might be defeated, they can have no cause of suit because the contingency occurred and the title failed. Their commission of ten dollars for each lot sold, and the possibility of obtaining the residue of the property and the assignment of the notes, after the purchase price was fully paid, was a sufficient consideration for their agreement. The contract provided that when the defendants had received seven thousand four hundred and four dollars and forty-one cents in actual cash from the sale of the property, if realized during the existence of the contract, they would convey to the plaintiffs all the unsold lots, and assign to them all notes wholly or partly unpaid. This gave to the plaintiffs an equitable interest in the land itself, as well as in the fund arising from its sale, subject, however, to be defeated by the condition that two thousand dollars in cash must be realized within six months from the date of the contract. To prevent the breach of this condition, they advanced the five hundred and forty dollars to

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make up the deficiency in the two-thousand-dollar payment. This was a voluntary payment upon their part, and made for their own benefit. They could have selected lots for themselves as a consideration for the payment, and had they purchased the entire tract, and paid the full consideration, the defendants would have been compelled to execute and deliver to them proper conveyances. If, upon the payment of the whole consideration, a conveyance could have been demanded, is it not equally true that upon the payment of a part of the consideration, they could have demanded a conveyance of a part of the property? By not selecting lots for themselves they elected to take the remainder of the property after the purchase price had been fully paid; and since the defendants had received in actual cash the full purchase price within the time agreed upon, the plaintiffs were at least entitled to select sufficient property to compensate them for the advances made, and as there was a total failure of the title after the full performance of the agreement, which precluded the plaintiffs from selecting or receiving any of the property they are entitled to the amount advanced by them and interest thereon from the date of payment. The decree, therefore, will be modified accordingly.

MODIFIED.

[Argued October 19: decided December 11, 1893; rehearing denied.]

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STATE v. BLOODSWORTH.

[S. C. 34 Pac. Rep. 1023.]

1. **INDICTMENT — FALSE PRETENSES — CODE, § 1777.**—An indictment under section 1777 of Hill's Code, for obtaining money by false pretenses, is sufficient in charging that defendant did obtain the money by means of certain specified false representations, without alleging that the person defrauded relied upon such representations.

Statement of the case.

2. FALSE PRETENSES—VARIANCE.—A note for eighty dollars, bearing indorsements showing the payment of forty-three dollars, is admissible in evidence on a trial for obtaining money under false pretenses, where the indictment alleges that the defendant falsely represented that a certain written and printed paper, with certain writing thereon signed by the defendant, was a valid promissory note for the payment of thirty-seven dollars, and it is shown that the defendant represented that the sum of thirty-seven dollars was due thereon, and that he indorsed on its back a guaranty of its payment, since the indictment charges that the note was valid for the payment of thirty-seven dollars, and not that the note itself was for that amount.
3. PRACTICE IN CRIMINAL CASES—MOTION TO DISMISS—DEMURRER—CODE, §§ 1322, 1330.—An objection that an indictment for obtaining money under false pretenses does not sufficiently describe the false token, must be made by demurrer, and cannot be raised for the first time at the trial by a motion to dismiss. *State v. Bruce*, 5 Or. 68, and *State v. Doty*, 5 Or. 493, cited and approved.

APPEAL from Multnomah: M. G. MUNLY, Judge.

J. Bloodsworth was indicted for obtaining money by false pretenses, committed as follows: "The said J. Bloodsworth, on the fifteenth day of December, A. D., eighteen hundred and ninety-two, in the county of Multnomah, and state of Oregon, did feloniously and falsely represent and pretend to one George H. Hill that a certain written and printed paper with certain writing thereon signed by J. Bloodsworth, then and there produced by him, the said J. Bloodsworth, and by him given to said George H. Hill as security for the payment of the sum of thirty dollars, was a good and valid promissory note for the payment of thirty-seven dollars and fifty cents, by means of which said false pretenses, the said J. Bloodsworth then and there did feloniously and fraudulently obtain from said George H. Hill divers gold and silver coins, lawful money of the United States of America, the number and denomination of which is to the grand jury unknown, to the amount and value of thirty dollars of the moneys of said George H. Hill, with intent then and there to cheat and defraud said George H. Hill,

Argument of counsel.

whereas, in truth and in fact, said writing and printed paper was not a good and valid promissory note for the payment of the aforesaid sum, or for the payment of any sum whatever, and this the said J. Bloodsworth then and there well knew, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

The evidence tended to show that at the time alleged the defendant applied to Hill for, and obtained, a loan of thirty dollars, giving as security therefor a promissory note for eighty dollars, dated August thirteenth, eighteen hundred and ninety-two, due in thirty days, and signed by J. A. and F. H. Melton, upon which he falsely represented there was due and unpaid the sum of thirty-seven and one half dollars, and at the same time signed the following written indorsement on the back of the note:—

"For value received, I hereby guarantee payment of within note at maturity, or any time thereafter, with interest at the rate of ten per cent per annum, waiving notice of nonpayment and protest. J. BLOODSWORTH."

At the trial the state offered in evidence the Melton note for eighty dollars, with the following indorsments on the back, "Received on the within note twenty-two dollars and fifty cents (\$22.50) this September fifteenth, eighteen hundred and seventy-two," and "Received on the within note twenty dollars (\$20.00)," and it was admitted over the defendant's objection. A conviction having resulted, the defendant has appealed.

AFFIRMED.

Messrs. John F. Logan and Berryman M. Smith, for Appellant.

1. It will be readily seen that the indictment does not charge that Hill relied on the statement made by the defendant J. Bloodsworth; that the note was a good and

Argument of counsel.

valid note at the time he took the same as security for the payment of thirty dollars. Without this being stated in the indictment it does not charge a crime: 7 Am. Eng. Enc. 770, note; *Killer v. State*, 51 Ind. 111; *Johnson v. State*, 75 Ind. 553; *State v. Green*, 7 Wis. 571; *State v. Dyre*, 41 Tex. 520.

2. We insist that there is a fatal variance between the indictment and proof. It will be seen that the indictment charges the false token to be the note signed by defendant J. Bloodsworth, for thirty-seven dollars and fifty cents, but the only note or other token relied on in the evidence is a note for eighty dollars, signed by J. A. Melton and F. H. Melton, and the only way that defendant's name is connected with it at all is that he made a written guaranty on the back thereof. True, there were some payments indorsed on it, but that made no difference in the matter of describing and identifying the note or putting the defendant on notice that any other note would be introduced at the trial except a note for thirty-seven dollars and fifty cents, signed by himself as charged in the indictment. If suit or action was commenced on a promissory note and alleged in the complaint that the note was for thirty-seven dollars and fifty cents, the plaintiff could not introduce a note for eighty dollars with forty-two dollars and fifty cents indorsed thereon to prove his case, and it seems to us that this is a fatal variance: *Shirley v. State*, 1 Or. 229; *Greenleaf*, 12th Ed. §§ 58, 65; *Sharley v. State*, 54 Ind. 168; *Westbrook v. State*, 23 Tex. App. 401; *Brown v. State*, 66 Ill. 344; *Bay v. State*, 65 Mo. 490.

Messrs. Geo. E. Chamberlain, Attorney-General, and *Wilson T. Hume*, District Attorney, for the State.

1. It is not necessary to allege in the indictment that the party injured relied upon the representations.

Opinion of the court—BEAN, J.

Under section 1777 of Hill's Code, if the brand is accomplished "by means" of the false pretenses, it is sufficient to constitute the crime: Bishop, Directions and Forms, § 420.

2. A careful reading of the indictment, we think, will clearly demonstrate that the appellant's claim of a variance between the proof and the charge is untenable. In the first place, the indictment charges the production to Geo. H. Hill by defendant, of a certain written and printed paper with certain writing thereon signed by Bloodsworth; that this paper was a good and valid promissory note for the payment of thirty-seven dollars and fifty cents, not that it was a note for thirty-seven dollars and fifty cents, but that it was valid for the payment of that amount. Whatever the face of the note may have been, the writing on the note was signed by Bloodsworth; but the indictment is silent as to who signed the note. The defendant was not charged with uttering as true and genuine a false and forged note, but with obtaining money under false pretenses. What were those pretenses? As disclosed by the bill of exceptions, defendant "guaranteed the payment of the within note," and the evidence shows that the note was fully paid before the indorsement and delivery thereof to George H. Hill. In other words, he pretended by his indorsement thereon that it was a good and valid promissory note, and obtained money thereon knowing that said note had been paid.

Opinion by MR. JUSTICE BEAN.

1. The first contention of appellant is that the indictment is insufficient to charge a crime, because it does not allege in express terms that Hill relied upon the false representations of the defendant to the effect that the paper so given as security was a good and valid promis-

Opinion of the court—BEAN, J.

sory note. It is undoubtedly essential, in a case of this character, that the indictment should show that the prosecuting witness was induced to part with his goods or money by his reliance upon the misrepresentations of the defendant. But it is not necessary that it should be so alleged in these express words. This is necessarily implied from the allegation that the defendant by means of the false representations obtained the goods or money: 7 Am. & Eng. Enc. Law, 771, note. As the indictment in this case contains such allegation, it is not open to the objection urged.

2. It is next contended that the court erred in admitting the said note in evidence. This contention is based upon the assumption that the indictment charges the false token or writing, by means of which defendant obtained the loan, to have been a promissory note for thirty-seven dollars and fifty cents, signed by the defendant, and therefore it was error to admit in evidence a promissory note of a different amount and signed by other parties. But we do not so understand the language of the indictment. It is somewhat obscure, and not as clear as legal papers of this kind should be, yet it charges, as we read it, that the defendant represented that a certain written or printed paper, which is not further described, and which had upon it a certain writing signed by the defendant, was a good and valid promissory note for thirty-seven dollars and fifty cents; that is to say, the written and printed paper upon which the writing signed by the defendant was indorsed, was such a note, and not that the writing which he signed was of that character. This being true, the objection urged to the admission of this evidence upon the ground stated, was properly overruled.

4. The objection that the indictment does not sufficiently describe the false token alleged to have been used

Points decided.

by the defendant, should have been made by demurrer, and could not be raised for the first time at the trial by by a motion to dismiss: Code, § 1330; *State v. Bruce*, 5 Or. 68, 20 Am. Rep. 734; *State v. Doty*, 5 Or. 491; *People v. Swenson*, 49 Cal. 388.

The judgment is affirmed.

AFFIRMED.

[Argued November 14; decided December 11, 1893.]

AH DOON v. SMITH.

[S. C. 34 Pac. Rep. 1093.]

1. **ILLEGAL CONTRACT—PLEADING—PROOF—PUBLIC POLICY.**—It is an established rule of pleading that the illegality of a contract sued on must be pleaded in order to be available as a defense; but if it should appear from the testimony of plaintiff's witnesses that the contract in question is illegal or immoral, the court ought to dismiss the proceeding of it. own motion on grounds of public policy, even though no such defense has been pleaded. *Buchtel v. Evans*, 21 Or. 309, cited and approved.
2. **WHAT IS A WITNESS'S TESTIMONY.**—The testimony of a witness is not only his evidence in chief, but is that evidence as explained, modified, limited, or contradicted by the cross-examination; both the direct and cross-examination must be treated as evidence given on behalf of the party calling the witness.
3. **SCOPE OF CROSS-EXAMINATION—CODE, § 873.**—Under the terms of section 873 of Hill's Code, a party may not cross-examine a witness on any matters other than those stated in the direct examination, or properly connected therewith; but within these limits the cross-examination should be liberal, and may properly extend to other matters that tend to limit, explain, or modify the facts stated on direct examination, provided they are directly connected therewith.
4. **ILLEGALITY OF CONTRACT SHOWN BY CROSS-EXAMINATION.**—Where plaintiff, in an action on contract, discloses on his examination in chief only so much of the transaction as leaves an inference of the contract's legality, it is proper for defendant to bring out on cross-examination the remaining facts and circumstances under which the contract arose, and which show its illegality.

APPEAL from Crook: W. L. BRADSHAW, Judge.

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Statement of the case.

This is an action by Ah Doon against C. S. Smith to recover the sum of seven hundred and forty dollars, alleged to have been loaned by plaintiff to the defendant, and also the sum of one hundred and forty-five dollars, alleged to have been received by the defendant for the use and benefit of the plaintiff. The complaint alleges, in substance, that on or about the sixteenth day of October, eighteen hundred and ninety-two, the plaintiff, at the instance and request of defendant, furnished, loaned, and delivered to him the sum of seven hundred and forty dollars in cash, which the defendant promised and agreed to repay, but has neglected and failed so to do; and, for a further and separate cause of action, that on the same day the defendant received and applied to his own use and benefit money belonging to the plaintiff in the further sum of one hundred and forty-five dollars, which he has refused and neglected to pay to the plaintiff. The answer specifically denies all the material allegations of the complaint.

At the trial the plaintiff, testifying in his own behalf, stated in general terms, that at the time alleged he furnished and delivered to the defendant seven hundred and forty dollars in coin, and that defendant took and appropriated to his own use one hundred and forty-five dollars in money belonging to the plaintiff, and that neither of said amounts, or any part thereof, had ever been repaid to him. Upon the cross-examination of plaintiff and his witnesses, the defendant was permitted to show by them, over plaintiff's objection and exception, that at the time the money was delivered to defendant by plaintiff, and as part of the same transaction, they were engaged in unlawful gaming; that the money was to be used by defendant in the game, and was so used, and that the one hundred and forty-five dollars taken by defendant was money lost by him in such game and taken

Opinion of the court—BEAN, J.

from the gambling table while the game was in progress. At the close of the testimony for plaintiff, the defendant moved for a dismissal of the action on the ground that the contract sued upon was against public policy and good morals, and one which a court of justice should not enforce. This motion was sustained, and plaintiff appeals.

AFFIRMED.

Mr. J. F. Moore, for Appellant.

Mr. Geo. W. Barnes (*Mr. M. E. Brink* on the brief), for Respondent.

Opinion by MR. JUSTICE BEAN.

1. Plaintiff did not, at the hearing, controvert the position taken by defendant that if the money sued for was delivered to him to be used in gaming, under the circumstances disclosed, it cannot be recovered in a court of justice, (*McKinnell v. Robinson*, 3 Mees. & W. 434; *Badgley v. Beale*, 3 Watt, 263,) but he insists that such a defense is new matter, and must be pleaded before it can be proved. As a rule of pleading this is undoubtedly correct. A defendant who has not pleaded the illegality of the contract sued on has no right to offer evidence of such illegality, and it is said he cannot avail himself of it when disclosed by the plaintiff's case if the court does not refuse to entertain the action: *Cardozo v. Swift*, 113 Mass. 250. But no waiver by the defendant, or neglect to plead such a defense, can oblige the court to entertain an action founded upon an illegal or immoral contract, when such illegality appears in the case. If it does so appear, the court may, and on principles of public policy and good morals ought to, dismiss the action and refuse to lend its aid to enforce such a contract. The rule is the same whether the illegality of the contract appears

Opinion of the court—BRAN, J.

from the plaintiff's case or is set up by way of defense: *Buchtel v. Evans*, 21 Or. 309, 28 Pac. Rep. 67. If the illegality appears from the plaintiff's own showing, the court will say to him, 'You have no right to be heard in a court of justice,' but if it does not so appear, it cannot be shown by the defendant unless pleaded. Defenses of this nature are sustained by the courts on general principles of public policy and good morals, and not to enable a defendant to redress any wrong he may have suffered while engaged in such unlawful practices. As was said by Lord MANSFIELD: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds, at all times, very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this, '*ex dolo malo non oritur actio*.' No court will lend its aid to a man who founds his cause of action upon an illegal or an immoral act. If from the plaintiff's own statement, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such a plaintiff": *Holman v. Johnson*, 1. Cowp. 343.

The question in this case, then, is as to whether the illegality of the pretended contract appeared from plaintiff's own case; and its solution must depend upon the fact of the evidence given by himself and his witnesses on that subject having been elicited by proper cross-examination, because all testimony thus elicited constitutes a part of the evidence in chief, and both the direct

and cross-examination must be treated as evidence given on the part of the party calling the witness. The testimony of a witness is not alone his evidence as given in chief, but it is the combined result of that given in chief as explained, modified, or contradicted by the cross-examination: *Campau v. Dewey*, 9 Mich. 417; *Wilson v. Wagar*, 26 Mich. 452. If, therefore, the cross-examination in this case was proper the illegality of the contract appeared from plaintiff's own case, and the motion to dismiss was properly sustained, although no such defense was pleaded in the answer.

There is much conflict in the books as to the proper limit of a cross-examination, but it is unnecessary for us to enter upon an examination of the authorities, or to attempt to ascertain the rule therefrom, because the question is settled by section 873 of Hill's Code, which provides that, "The adverse party may cross-examine the witness as to any matter stated on his direct examination or connected therewith, and in so doing may put to him leading questions, but if he examine him as to other matters such examination is to be subject to the same rules as the direct examination." Under this statute, and the rule there provided, a party has no right to cross-examine a witness except as to facts and circumstances stated on his direct examination or connected therewith; but within this limitation great latitude should be allowed in conducting the examination. It should not be limited to the exact facts stated on the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination. It is true the party against whom a witness is called cannot, on cross-examination, go into an independent or affirmative case on his part,

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but must confine his examination to such facts connected with the direct examination as go to counteract so much of the case of his adversary as the direct examination tends to prove, but the fact that evidence called forth by a legitimate cross-examination also tends to sustain some defense affords no reason why it should be excluded. A party will not be permitted to glean out certain facts from his witness, which, without explanation, would give a false coloring to the matter about which he testifies, and then save his witness from the sifting process of a cross-examination by which the real transaction could be shown.

4. When a witness is called and examined concerning any particular matter, the law imposes the obligation upon him to state the whole truth concerning such matter within his knowledge, and a direct examination, if perfectly fair, would generally disclose all the witness knows concerning the matter about which he is testifying. But because the party calling him may so skillfully and adroitly conduct the examination in chief as to disclose only those facts which are in his favor, and conceal those which are against him, the law has given to the adverse party the right of cross-examination for the purpose of bringing out the facts thus concealed. Now, in this case, when the plaintiff was called and examined in chief concerning the alleged loan, the law imposed upon him the obligation to state the whole truth, and if he had done so he would have disclosed the fact that it was not a legitimate loan, but that he and the defendant were, at the time, engaged in an unlawful game; that he furnished defendant money to enable him to engage in it; that defendant lost the money so furnished, and plaintiff redelivered it to him, and this continued until the aggregate amount of such pretended loan reached the sum of seven hundred and forty dollars; and that the

Points decided.

remaining one hundred and forty-five dollars sued for was money thus loaned and lost, and which defendant took from the gambling table. He would have thus disclosed and set forth facts upon which no court of justice would grant him relief. But having on his examination in chief disclosed only so much of the transaction out of which the pretended contract arose as was favorable to him, and which left the inference that it was legitimate and legal, and, having concealed the facts which were against him, it was within the limits of a strict cross-examination for the defendant to bring out the remaining facts concerning the pretended loan and the circumstances under which it was made. And while the objection that his contract with the plaintiff is illegal and immoral, sounds very ill in the mouth of the defendant, it is not for his sake the objection is allowed, but upon principles of public policy, which he "has the advantage of contrary to real justice as between him and the plaintiff." So that, although there appears to be some equity in favor of the plaintiff and against the defendant, it cannot avail him in this case. We hold, therefore, that the motion to dismiss was properly sustained, and the judgment must be affirmed.

AFFIRMED.

[Argued October 23; decided November 27, 1893.]

PIERCE v. KELLY.

[S. C. 24 Pac. 923.]

1. CHATTEL MORTGAGE—PRESUMPTION OF FRAUD—CHANGE OF POSSESSION—CODE, § 778, SUBDIVISION 40.—The change of possession of mortgaged chattels necessary to rebut the presumption of fraud raised by subdivision 40 of section 778 of Hill's Code, when the mortgage has not been filed or recorded, must be actual as distinguished from constructive

NOTE.—The question here reviewed is also discussed in the case of *Fisher's Estate*, ante, p. 64.—REPORTER.

Statement of the case.

or legal, and it must be accompanied by such outward acts of ownership as will indicate to the public that the property has changed hands. The possession of the mortgagee should also be exclusive, and not jointly or concurrently with that of the mortgagor.

2. CHATTEL MORTGAGE—EVIDENCE OF FRAUD.—Where an employe of a person operating a store takes a mortgage on the goods, which is not recorded, the fact that he thereafter purchases other goods without disclosing the fact that he claimed possession of the goods in the store under his mortgage, does not necessarily raise a presumption of fraud if he paid for them; but, if the purchase is made through a prior employe of the mortgagor, without notice to the seller of the change in his employment, it tends to show that there was no such change in the possession of the goods in the store.

CHATTEL MORTGAGE—NOTICE TO CREDITORS OF MORTGAGOR—HARMLESS ERROR.—An instruction that a chattel mortgage is not good as against creditors who have no notice of its existence, unless placed on file, is erroneous under the Oregon statute as it existed prior to the legislative session of eighteen hundred and ninty-three, but it is harmless where the record shows that the creditor had notice of the execution of the mortgage, and the jury are expressly instructed that a mortgage is good as to such a creditor although not filed.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

Action by E. D. Pierce against Penumbra Kelly, sheriff of Multnomah County, to recover possession of a stock of groceries. Pierce claimed to be a mortgagee of the property after condition broken, while the sheriff claimed possession under a writ of attachment in an action brought by E. S. Larsen & Co. against the mortgagor to recover the value of goods, wares, and merchandise sold and delivered to him prior to the making of the mortgage. The defense to the action is that the mortgage is void because made to hinder, delay, and defraud creditors. A trial before a jury resulted in a verdict and judgment in favor of the defendant, from which plaintiff appealed.

AFFIRMED.

Messrs. Berryman M. Smith, and Victor K. Strode, for Appellant.

Opinion of the court—BEAN, J.

Mr. Daniel R. Murphy (Messrs. John M. Gearin, Julius Silvestone, and Geo. A. Brodie on the brief), for Respondent.

Opinion by MR. JUSTICE BEAN.

The facts as disclosed by the bill of exceptions, are substantially as follows: One Matthias Apach was, on the eleventh day of August, eighteen hundred and ninety-two, and for some time prior thereto had been, conducting, as owner and proprietor, a retail grocery store in Albina, and plaintiff had been in his service as bookkeeper for a number of years, but, it is claimed, had never been paid for his services, although he had demanded payment, or that the amount due him be secured by a mortgage on the stock of goods. On the fifth of August, eighteen hundred and ninety-two, Apach, without the knowledge of the plaintiff, made and executed a promissory note in his favor for nine hundred and eleven dollars, payable on demand, and secured the same by a mortgage on the entire stock of goods in the store. Apach retained the note and mortgage in his possession, without informing plaintiff of their execution, and continued to conduct the business, buying and selling goods as he had been accustomed to do, until the eleventh day of August, when he delivered the note, and, it is claimed, the store and its contents, to plaintiff, but the mortgage was never filed for record although Larsen & Co. had notice of its existence before the goods were attached. The evidence tends to show that plaintiff thereupon opened a new set of books, notified the deliveryman to report to him, and proceeded to sell the goods at retail, replenishing the stock by cash purchases from time to time, Apach remaining in and about the store apparently exercising control as if interested in the business, and to all outward appear-

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ances there was no change in the business or the manner of conducting it. The business was thus conducted until the twenty-second day of August, eighteen hundred and ninety-two, when the stock was attached as hereinbefore stated. The questions to be determined in this case arise out of certain instructions given and refused by the trial court.

1. The first instruction excepted to is as follows: "In this case you will have to consider another proposition, and that is whether there was such a delivery of these goods as took the place of the recording of the mortgage; the mortgage has never been placed on file, as I understand it, and the question then arises as to the actual, continual change of the possession of the goods; on that point you should consider what the relations of these parties have been before the execution of this mortgage. Mr. Peirce and Mr. Apach are claiming by their counsel, as I understand them, to have occupied the relation of employer and employé before this mortgage was made. Mr. Peirce was about the store there transacting business, delivering goods, receiving moneys, etc., but as the employé of Apach. After the mortgage was made, it is claimed that the position was reversed; that Apach became the employé, and Peirce the principal. I instruct you that in order to have a complete, actual change of the possession of these goods, and to have divested the case of those presumptions of fraud which arise where there is a lack of continual possession of the goods, there should have been some public notice given of the relations they are assuming, that those who deal with the firm might have been able to see and know the change in the situation. And if you believe that to all appearances, so far as the creditors of Apach were concerned, the situation of affairs and control of the goods was the same after the execution of the mortgage as it

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was before, then it is one of those cases where the presumption of fraud as to creditors would attach, because the possession had not been changed, and the change in possession had not been continued." By subdivision 40 of section 776 of Hill's Code it is provided, in substance, that every mortgage of personal property capable of immediate delivery which is not filed or recorded shall be presumptively fraudulent as to creditors of the mortgagor unless it is accompanied by an immediate delivery and be followed by an actual and continued change of possession. In this case the mortgage was not filed or recorded, and hence this presumption would attach unless there was an actual and continued change of possession of the mortgaged property. The change of possession necessary to overcome and rebut this presumption must be actual, and not merely constructive or legal; it must be effected in a way calculated to give notice to the public that there has been a change in the ownership or control of the property, and a mere constructive possession, or one taken by words and inspection, will not satisfy the statute: 1 Cobbey, Chattel Mortgages, § 497. The possession of the mortgage must be exclusive, and accompanied with such outward acts and *indicia* of ownership as will apprise the public, and particularly those who are accustomed to deal with the parties, that the goods have changed hands, and the possession has passed from the mortgagor to the mortgagee. There must be a complete change in the dominion and control over the property, and a concurrent or joint possession with the mortgagor is not sufficient (*McKibben v. Martin*, 64 Pa. 352, 3 Am. Rep. 588; *Kitchen v. Reinsky*, 42 Mo. 437,) although where there is such a change in the possession and control there perhaps can be no legal objection to the employment of the mortgagor to render services in and about the business, as any other agent or employé. This we understand to

Opinion of the court—BEAN, J.

be the rule laid down in the instruction complained of, and hence the court did not err in giving it.

2. The next alleged error is that, after the general charge, counsel for plaintiff orally requested the court to instruct the jury that if plaintiff had bought goods after he took possession under the mortgage, without disclosing the fact to the persons from whom the purchases were made, it would not create a presumption of fraud, if he paid for them, whereupon the court further instructed the jury as follows: "That principle is correct, I qualify it in this way—the jury will recollect and call to mind how these goods represented here by the yellow bills, which have been used in evidence, came to be purchased, and who purchased them, and what relation the man who went and brought these goods to the store had been occupying to these parties. If he had been a servant of Apach, and in this transaction was the servant of Peirce, and did not disclose to the creditors the change in his employment, and Peirce did not cause notice to be given, in that event the principle concerning the fraudulent transaction which I have related in the general charge will apply." The objection urged to this instruction is that it left the impression with the jury that such conduct on the part of the plaintiff was a fraud upon creditors, but we think counsel have entirely misconceived the effect of the instruction. Its manifest object and effect, when taken in connection with the general charge, is that while a purchase of goods by the plaintiff, without disclosing the fact that he claimed to have possession under his mortgage, would not necessarily create a presumption of fraud if he paid for them, yet, if such purchase was made through a prior servant or employé of Apach, without some notice having been given to the person with whom he was dealing of the change in his employment, it would tend to show that there had never been such a change in

Opinion of the court—BEAN, J.

the possession of the store as to rebut the fraudulent presumption arising from the retention of possession by a mortgagor. And in this view we think there was no error in giving the instruction.

3. The next assignment of error is that the court, in answer to the interrogatory of a juror, said that "A chattel mortgage need not be placed on file to be good as between the parties, and good between all who know all about it, or have been netified. It is not good, unless placed on file, as to creditors who have no notice of its existence." This instruction, it is claimed, is at variance with the opinion in the case of *Marks v. Miller*, 21 Or. 317, 28 Pac. Rep. 14, 14 L. R. A. 190, in which it was held that, under the statute as it existed prior to the legislative session of eighteen hundred and ninety-three, (Laws, 1893, 30), a chattel mortgage given in good faith, although not filed, is valid as against creditors and subsequent purchasers. If, by the instruction complained of, the court intended to say that a chattel mortgage, executed prior to the act of eighteen hundred and ninety-three, is void as to creditors without notice unless placed on file, it was in error, but however that may be the error was entirely immaterial in this case because the record shows affirmatively that the attaching creditor had notice of the execution of plaintiff's mortgage before the property was attached, and the court expressly told the jury that a mortgage would be good as to such a creditor, although not filed. Therefore plaintiff could not have been prejudiced by the error into which the court seems to have inadvertently fallen, having in mind, no doubt, the fact that the rule stated by him prevails by statute in almost every state of the union except Oregon. The other assignments of error have all been carefully examined, and we deem it sufficient to say, without further extending the opinion, that we find no error in the record which

Per Curiam.

requires a reversal of the judgment, and it will therefore be affirmed. AFFIRMED.

[Decided December 23, 1893.]

LESTER v. ELWERT.

[U. S. C. 36 Pac. Rep. 29.]

1. PRACTICE IN SUPREME COURT—SERVICE OF AFFIDAVITS.—Affidavits in support of a motion before the supreme court should be filed with the motion so that the opposite party may have an opportunity to meet them before the hearing.
2. ABANDONED APPEAL—DAMAGES.—Damages will not be allowed to respondent in case of an abandoned appeal where the appellant, before the time for appeal had expired, offered to pay the judgment, and the transcript was filed by respondent.

APPEAL from Multnomah: H. HURLEY, Judge.

F. W. Lester recovered a judgment against Jacobena Elwert, and the latter took steps tending to an appeal. The transcript not having been filed, the respondent moves the supreme court for an affirmance of the judgment under rule seven of the rule of the supreme court promulgated February twenty-eight, eighteen hundred and eighty-nine: 19 Or. 589. DISMISSED.

Mr. Samuel H. Gruber, for the motion.

Mr. Nathan D. Simon, contra.

PER CURIAM.

The appeal in this case having been abandoned, the respondent, on October fifth, eighteen hundred and ninety-three, served a notice upon the attorney for appellant that on the sixteenth of the month he would move this court for an affirmance of the judgment. No showing

Per Curiam.

was made, or attempted to be made, at the time the notice was served, or at any time before the hearing, that the appeal was not taken in good faith, nor was appellant notified in any way that the motion would be supported at the hearing by affidavits. However, two days before the time fixed for the hearing the appellant served upon respondent, and filed in this court, her own affidavit, in which she states that the appeal was taken in the utmost good faith, and only abandoned on the advice of her counsel that the amount involved would not justify the expense of an appeal; and also the affidavit of her counsel, in which he states that he offered to pay the full amount of the judgment and costs before the time for filing her transcript on the appeal had expired, and before any transcript had been made or ordered by respondent, but that counsel for respondent would not accept the same unless he would also pay ten per cent on the amount of the judgment as damages for the delay, and fifteen dollars for attorney's fees, which he refused to do; that on the following day, and before the transcript was made or ordered, he paid to the sheriff the full amount of the judgment, costs, and disbursements, and the costs on execution. At the hearing, the respondent, for the first time, filed several affidavits tending to show that the appeal was taken for the purpose of delay, and with no intent of being prosecuted, and that the payment by Mr. Simon to the sheriff was made after the transcript had been made and filed in this court by the respondent; but Mr. Gruber, the attorney for the respondent, admits and avers in his affidavit that Mr. Simon offered to pay him the full amount of the judgment and costs on October fourth, before the transcript was ordered, and that he demanded ten per cent on the judgment as damages, and an additional sum of fifteen dollars for his services as attorney in "preparing cross-bill of exceptions"; and because Mr.

Per Curiam.

Simon refused to pay these additional amounts he brought the case here for affirmance.

After hearing the argument of counsel, the court decided the motion orally, holding: (1) That the affidavits presented by respondent showing, or tending to show, that the appeal was taken for the purpose of delay and not in good faith, came too late at the hearing, but should have been served and filed with the notice of the motion for affirmance so that the appellant could have come prepared to meet the statements in the affidavits if she had desired to do so; and that, in view of the rule that the court would not presume bad faith in the appellant, the respondent was not entitled to damages: *Hawkins v. Jones*, 21 Or. 502, 28 Pac. Rep. 548. (2) The affidavits show, and it is admitted by respondent, that appellant, before the time in which to perfect her appeal had expired, and while she yet had a right under the law to file her transcript in this court, offered to pay to the respondent all that was due on the judgment, but respondent refused to accept it, and hence there was no necessity of bringing the case to this court and making additional costs.

Since this decision a petition for rehearing, accompanied by various and sundry additional affidavits, letters, petitions, etc., has been filed. We see no reason to depart from the conclusions already reached, but, because the prior decision was oral, make this memorandum of the grounds thereof.

DISMISSED.

Statement of the case.

[Argued November 1; decided December 11, 1893.]

25	105
46	248

BRIDAL VEIL LUMBERING CO. v. JOHNSON.

[S. C. 34 Pac. Rep. 1026.]

1. NOTICE OF APPEAL—BILL OF EXCEPTIONS—CODE, § 537.—Much greater care is necessary in specifying errors in a notice of appeal where there is a bill of exceptions than where the appeal rests entirely upon the record, since the respondent is presumed to take notice of matters of record, but would not be chargeable with knowledge of a decision upon matters not in writing.
2. EMINENT DOMAIN—PLEA IN ABATEMENT—CODE, § 3263.—Under the provisions of section 3263 of Hill's Code, a landowner, in an action to condemn a right of way across his property, may unite in his answer any legal defenses with a claim for damages; and under this rule a denial of corporate existence need not be set forth as a plea in abatement in such cases. *Hopwood v. Patterson*, 2 Or. 49, *Or. Cent. R. R. v. Scoggin*, 3 Or. 181, and *Derkney v. Belfs*, 4 Or. 258, distinguished.

APPEAL from Multnomah: H. HURLEY, Judge.

This was an action brought by the Bridal Veil Lumbering Company, under sections 3239 and 3240 of Hill's Code, against D. S. Johnson to appropriate a right of way across defendant's land. The company having previously attempted to build across defendant's land without making any compensation whatever, was successfully enjoined, 24 Or. 183, and thereupon began this action. A trial having resulted in a verdict and judgment for plaintiff, defendant appeals, assigning error of the trial court in striking out part of the answer.

REVERSED.

Mr. James Finley Watson (*Mr. Edward B. Watson*, on the brief), for Appellant.

Mr. Lewis L. McArthur (*Messrs. Earl C. Bronaugh, Wm. D. Fenton, and Earl C. Bronaugh, Jr.*, on the brief), for Respondent.

Opinion by MR. JUSTICE MOORE.

The material allegations of the complaint involved in this appeal, in substance, are: That the plaintiff is a corporation organized for the purpose, among other things, of constructing and operating a railroad in this state between given terminal points; that it is necessary and convenient that a tract thirty feet in width on each side of the center line of said railroad as surveyed across defendant's land be appropriated. The answer having denied these allegations, the portion thereof containing such denials was, upon motion of the plaintiff, stricken out by the court, and a jury trial being had upon the remaining issues, a verdict was returned fixing the compensation at two hundred dollars. This amount having been paid into court, a judgment for the appropriation of said land was rendered, from which the defendant appeals, and assigns in his notice thereof the following grounds of error: (1) "That the court erred in that it sustained in part the motion of the plaintiff to strike out portions of the answer"; and (2) "The court erred in that it made its order striking out a portion of the answer of the defendant."

1. The plaintiff contends that these assignments of error are too general, and do not clearly point out the part of the answer stricken out. Section 537 of Hill's Code, provides that when an appeal is taken from a judgment at law, the notice "shall specify with reasonable certainty the ground of error upon which the appellant intends to reply," but when a motion or demurrer specifies the grounds upon which it is predicated, it is only necessary that the specifications of errors should distinguish with clearness and certainty the particular ruling of which a review is sought: Elliott, Appellate Procedure, §§ 336, 337. The record shows that the mo-

tion clearly designated the particular parts of the answer which it assailed, and the ground upon which it was based; that the court sustained all the said motion, and made an order striking out the portion of the answer to which it was directed; and hence the first specification of error in the notice of appeal, while it clearly points out the motion, does not directly describe the error sought to be reviewed. The second specification, however, distinguishes the particular ruling complained of with clearness and certainty, and, although one assignment cannot aid another, tested by the foregoing rule they are sufficient to show to the adverse party, as well as to the court, what motion and order were referred to by the appellant. No exceptions are required to be taken or allowed to any decision upon a matter of law when it is entered in the journal or made wholly upon matters in writing and on file in the court: Hill's Code, § 233; and when an appeal rests upon the record, and not upon a bill of exceptions, if the notice designates with reasonable certainty the decision complained of, it is the duty of the appellate tribunal to review the proceedings. When a bill of exceptions is required to present the errors complained of, much greater care is necessary in specifying such errors in the notice of appeal, upon the theory that the respondent is not presumed to take notice of any decision upon matters of law not entered in the journal, or when made upon matters not in writing. No bill of exceptions appears in the record of this cause, but inasmuch as the decision was made wholly upon matters in writing filed in the court below and sufficiently designated in the notice of appeal, this court will examine the specifications of error appearing in said notice.

Section 45, title III., of chapter VII., p. 534 of the general laws of Oregon, as compiled by Matthew P. Deady and Lafayette Lane, provided, as originally enacted, that in

actions for the appropriation of land the owner might set forth in his answer any legal defense to the appropriation of such land, or any portion thereof; or, omitting such defense, might aver the true value of the land in question, or the damage resulting from the appropriation thereof, or both. Under this section it was held that a defendant in such case could not unite these defenses: *Oregon Cent. R. R. Co. v. Wait*, 3 Or. 91. This section, however, was, on October twenty-sixth, eighteen hundred and eighty-two, amended by the legislative assembly, and it now provides that the defendant, in his answer, may set forth any legal defense he may have to the appropriation of such lands, or any portion thereof, and may also allege the true value of the lands and the damage resulting from the appropriation: Hill's Code, § 3263. Under this section, as thus amended, a landowner has a right to interpose any legal defense, coupled with a claim for the damages that he might sustain by reason of the appropriation. Without this statute upon the subject the court might properly hold that an answer in the nature of a plea in abatement could not be joined with an answer to the merits: *Hopwood v. Patterson*, 2 Or. 49; *Oregon Cent. R. R. Co. v. Scoggin*, 3 Or. 161; *Derkeny v. Belfils*, 4 Or. 258. Section 18 of article I. of the constitution provides that private property shall not be taken for public use without just compensation having first been assessed and tendered. "This is equivalent to saying it shall not be taken for private use, even though just compensation be made": *Dalles Lumbering Co. v. Urquhart*, 16 Or. 69, 19 Pac. Rep. 78. The state, by virtue of its sovereignty, possesses the right to take the property of the citizen for the good of the public; and, while it may not delegate the power to exercise this sovereign right, it may, by its legislature, select agents to take private property subject only to the limitations contained

Points decided.

in the constitution: Lewis, Eminent Domain, § 242. Section 3240 of Hill's Code, provides that a corporation organized for the construction of any railway may appropriate so much of any land lying between its termini as may be necessary for cuttings, embankments, and for the proper construction, security, and convenient operation of its line of road. This appoints any corporation organized for the construction of a railway the agent of the state, and authorizes it to appropriate the necessary land for the successful operation of its line of road. The plaintiff alleges that it was incorporated for this purpose, and thus became the agent of the state, which the defendant denies. Under the amended statute the defendant had the right to interpose this legal defense, and it was error in the court to strike it from the answer, for which reason the judgment is reversed and a new trial ordered.

REVERSED.

[Argued October 25; decided December 11, 1893; rehearing denied.]

BAYS v. TRULSON.

[S. C. 85 Pac. Rep. 26.]

25	109
28	79
25	109
30	468
25	109
41	18
25	109
42	200
42	611

1. **PLEADING ESTOPPEL.**—The rule is well settled that an estoppel by deed or record must be pleaded to be available either as a cause of action or as a defense. *Rugh v. Ottenheimer*, 6 Or. 231, and *Remillard v. Prescott*, 8 Or. 37, approved and followed.*

2. **TAX SALES—EVIDENCE OF REGULARITY OF PROCEEDINGS.**—In the absence of a provision making a tax deed *prima facie* evidence of the regularity of the proceedings anterior thereto, the claimant under such a deed must show the regularity and completeness of every step required by the statute in the assessment and collection of the tax. The reasoning of *THAYER, J.*, in *Strode v. Washer*, 17 Or. 57, approved.

3. **PAROL EVIDENCE TO CONTRADICT A RECORD.**—The rule is that where a record is not required to be made, but one is kept, it may be explained

* NOTE.—See also *Bruce v. Phoenix Insurance Co.* 24 Or. 486, to the same effect.—REPORTER.

Statement of the case.

or supplied by parol testimony, but where a statute requires a record, as in the case of a sale of property for taxes or street improvements, parol testimony cannot be received to contradict or vary the record after it has once been made; thus, where it appears from the return of an officer on a warrant for the sale of certain lots for an unpaid street assessment that the lots were sold *en masse*, it cannot be shown by parol that the lots were in fact sold singly, since that would be to vary a record which the law required to be made.

4. SALE OF PROPERTY FOR DELINQUENT STREET IMPROVEMENTS UNDER SECTIONS 106, 107, AND 126 OF PORTLAND CITY CHARTER OF 1882.—Section 292 of Hill's Code, gives a sheriff an unreviewable discretion as to whether he will sell lots on execution *en masse* or in separate parcels, (*Griswold v. Stoughton*, 2 Or. 62, *Dolph v. Barney*, 5 Or. 192, *Bank v. Page*, 7 Or. 454,) and this rule is apparently incorporated into the Portland city charter of eighteen hundred and eighty-two, so far as concerns the sale of lots for delinquent street improvements, including sewers, by section 107 thereof, which provides that a warrant for such improvements shall have the force and effect of an execution against real property, except as otherwise provided, but the terms of sections 106 and 126 of the charter, which require the officer to whom a warrant for a delinquent street improvement is addressed to levy on the lot or part thereof upon which the assessment is unpaid, and to specify in his return the amount for which each lot or part thereof sold, show that the procedure on such sales has been otherwise provided for, and that sales for delinquent street improvements must be made in separate lots.
5. PORTLAND CHARTER OF EIGHTEEN HUNDRED AND EIGHTY-TWO—RETURN ON WARRANT FOR SALE OF PROPERTY.—Portland City Charter, § 126, which requires a return of the amount for which each lot or part thereof was sold, is mandatory on the officer executing the warrant, and a failure to make such a return renders the sale, and the deed executed in pursuance thereof, void.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This is an action by John Bays to recover the possession of lots five and eight in block eighty-seven of Couch's Addition to Portland, to which the plaintiff claims title by virtue of a deed from the chief of police of said city upon a sale of said lots for an alleged delinquent assessment; while the defendant claims title by mesne conveyances from the United States. The facts show that the city of Portland constructed what is known as Tanner-

Statement of the case.

creek sewer from North Fourteenth and B Streets to low-water mark in the Willamette River; that an assessment for the cost thereof was on August twentieth, eighteen hundred and eighty-seven, entered in the docket of city liens; that the lots in question, then owned by Thomas Brasel, were assessed at eighteen dollars and seventy-five cents each as the property of Thomas Brasel, and that warrants for the collection of said assessments were issued to, and placed in the hands of, the chief of police; that on December third, eighteen hundred and eighty-seven, John Paulsen and others, among whom was said Thomas Brasel, commenced a suit in department number two of the circuit court of Multnomah County, against the city of Portland and others, to enjoin the collection of the assessments, and for the cancellation of the entries thereof in the docket of city liens, and obtained a temporary injunction, which was on February twentieth, eighteen hundred and eighty-eight, by decree of said court, made perpetual. The defendants took an appeal from said decree to this court, where it was reversed (*Paulsen v. Portland*, 16 Or. 450, 19 Pac. Rep. 450, 1 L. R. A. 673,) and, on November seventeenth, eighteen hundred and eighty-eight, upon a mandate from this court, a decree was entered in the court below dismissing the suit. The plaintiffs thereupon appealed to the supreme court of the United States, where, on April seventeenth, eighteen hundred and ninety-three, the decree of this court was affirmed: *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. Rep. 750. On November thirtieth, eighteen hundred and eighty-eight, warrants, including the one involved in this action, were again issued to and placed in the hands of the chief of police, to collect said assessments, and that officer, by virtue thereof, levied upon the said lots, and on February eighteenth, eighteen hundred and eighty-nine, after due notice, sold the same to the

Opinion of the court—MOORE, J.

plaintiff for forty-five dollars and five cents, and on the next day executed and delivered to him a deed therefor. On January third, eighteen hundred and eighty-nine, Thomas Brasel conveyed said lots to one Betty Farmer, and she, on October sixteenth, eighteen hundred and ninety, to defendant, both conveyances being by warranty deed.

Plaintiff originally commenced three actions against the tenants of the defendant, Swan Trulson who was substituted for them, and the actions were thereupon consolidated by order of the court. The complaint is in the usual form, and the material allegations therein are denied by the defendant, who, for a separate defense, sets out the alleged defects in the proceedings upon which plaintiff claims title, from the entry of the assessment in the docket of city liens to the execution and delivery of plaintiff's deed. The reply denied the allegations of new matter in the answer, and the cause being at issue, was tried by the court without the intervention of a jury, resulting in a judgment for the defendant, from which the plaintiff appeals.

AFFIRMED.

Mr. Edward B. Watson (*Mr. James Finley Watson* on the brief), for Appellant.

Mr. U. S. Grant Marquam (*Chas. J. Mac Dougall* on the brief), for Respondent.

Opinion by MR. JUSTICE MOORE.

1. This appeal presents several questions but we do not deem it necessary to consider them all. The bill of exceptions shows, among other alleged errors, that the plaintiff offered in evidence the judgment roll in the case of *Paulsen v. Portland*, to show that the defendant's grantor, Thomas Brasel, had been a party plaintiff in

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said suit, and that the defendant was, by the decree therein, estopped from questioning the validity of the assessment, to the introduction of which the defendant objected, and, the court having sustained the same, the plaintiff excepted, and his exception was noted and allowed, and he now contends that this was error. The decree in *Paulsen v. Portland* is not pleaded as an estoppel. The rule is well settled that an estoppel by deed or record, to become available as a cause of action or of defense, must be pleaded. The party is entitled to know from the pleadings the nature and character of the cause of suit, action, or defense, that he may be prepared to meet the issue: Bigelow on Estoppel, 697. If the rule were otherwise, pleadings would, in many cases, impart little or no information to the adverse party of the real cause of action or defense, and would, as a consequence, become a trap to catch an unsuspecting party relying upon the apparent issue presented therein. At common law it was unnecessary to plead an estoppel *in pais*, (Bigelow on Estoppel, 699,) but this court, careful of the interests of litigants, and desirous of protecting them from surprise, has wisely held that even an estoppel *in pais* to be available must be pleaded: *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513; *Remillard v. Prescott*, 8 Or. 37. The rejection of the said judgment roll was therefore not error.

2. The defendant offered in evidence the return of the chief of police upon the warrant for the sale of the property in question, from which it appeared that said lots were sold *en masse*, to the introduction of which the plaintiff objected, and, the court having overruled the same, his exception was noted and allowed. The plaintiff contends that this was error, and that the return could not be introduced in evidence to defeat his deed. Section 105 of the charter of said city (Session Laws, 1882, p. 168) provides that if the sum assessed upon any

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lot, or part thereof, is not wholly paid, the council may order a warrant for its collection. The other sections of said charter applicable to the case at bar are as follows:—

“Section 106. Such warrant must require the person to whom it is directed to forthwith levy upon the lot or part thereof upon which the assessment is unpaid, and sell the same in the manner provided by law, and to return the proceeds of such sale to the city treasurer, and the warrant to the auditor, with his doings indorsed thereon, together with the receipt of the city treasurer for the proceeds of such sale as paid to him.

“Section 107. Such warrant shall have the force and effect of an execution against all real property, and shall be executed in like manner, except as in this chapter otherwise specially provided.

“Section 108. The person executing such warrant shall immediately make a deed for the property sold thereon to the purchaser, stating therein that the same is made subject to redemption, as provided in this chapter. Within three years from the date of such sale the owner, or his successor in interest, or any person having a lien by judgment, decree, or mortgage on the property or any part thereof separately sold, may redeem the same upon the terms and conditions provided in the next section.

“Section 126. The deed to the purchaser must express the true consideration thereof, which is the amount paid by the purchaser, and the return of the person executing the warrant must specify the amount for which each lot or part thereof sold, and the name of the purchaser.”

The charter nowhere provides that such deed shall be *prima facie* evidence of the regularity of the proceedings. “It must be conceded,” said THAYER, J., “that if there were no statute creating a presumption in such cases, the holder of a tax deed could establish no title to the prem-

ises by virtue thereof, without proof that every requirement of the statute, concerning the assessment of the tax, and enforcement of its payment, had been complied with": *Strode v. Washer*, 17 Or. 50, 16 Pac. Rep. 926. Hence the defendant had a right to offer in evidence the whole or any part of the record of the proceedings, from the assessment of the property to its sale.

3. The plaintiff asked leave to have the return of the officer amended, and offered to show by the testimony of the chief of police and his clerk that said lots were sold singly, and not in gross, but the court, upon the objection of the defendant, denied the application, and rejected the evidence, to which ruling the plaintiff excepted, and his exception was allowed, and this is assigned as error. The rule is that where the law does not require a record to be made, but one is kept, it may be explained or supplied by parol testimony; but where the statute requires it, parol evidence cannot be received to contradict or vary the record made: 20 Am. & Eng. Enc. 511. In *Cartwright v. McFadden*, 24 Kan. 662, the defendant, for the purpose of sustaining his tax deed, offered to prove that the sale of lots was not made in gross, but that each lot was sold separately, to which the plaintiff objected, and the evidence was rejected. The court held that it was properly excluded as it attempted to contradict the recitals of the deed. "The highest consideration of public policy requires that the officer himself, to whom the law has intrusted the performance of a public duty, and of the fulfilment of which a record has been made, should not be permitted to open his mouth to impeach it, and thus admit himself guilty of official misconduct or crime": *McMicken v. Commonwealth*, 58 Pa. St. 214. There was no error in rejecting the evidence offered, or in denying the plaintiff permission to amend the return.

4. The record discloses that the property in question

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was entered in the docket of city liens as separate lots, and an assessment of eighteen dollars and seventy-five cents was assessed against each; that the return made by the chief of police upon the warrant commanding the sale thereof shows that the property was sold as one entire tract to the plaintiff for the sum of forty-five dollars and five cents; and that the deed executed and delivered in pursuance of such sale recites the same facts; and for this reason, among others, the trial court held that the sale and deed failed to convey title to the property. It is a well-recognized principle that the sale of property for the payment of delinquent taxes should be made of the parcels of land as they appear in the assessment roll, and to group lands in the sale which are assessed as separate tracts, even though owned by the same person, will render the sale ineffectual to convey the title: Cooley on Taxation, 493; Burroughs on Taxation, 302; Blackwell on Tax Titles (5th Ed.), § 526. The appellant contends that this general rule is not applicable to the case at bar, and that under the charter of the city a sale *en masse* was within the discretion of the chief of police. Section 107 of the charter provides that the warrant for the collection of a delinquent assessment shall be enforced in the same manner as an execution against real property; and section 292 of Hill's Code provides that real property consisting of several known lots or parcels shall be sold upon execution, separately or otherwise, as is likely to bring the highest price. This leaves the sale of real property, consisting of several known lots, entirely to the discretion of the sheriff as to whether he will sell it in separate parcels or not: *Griswold v. Stoughton*, 2 Or. 62, 84 Am. Dec. 409; *Dolph v. Barney*, 5 Or. 192; *Bank v. Page*, 7 Or. 454. Section 106 of the charter provides that the warrant must require the person to whom it is directed to forthwith levy upon the lot or part thereof upon which

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the assessment is unpaid, and sell the same in the manner provided by law; and section 126 provides that the return of the person executing the warrant must specify the amount for which each lot or part thereof sold. If these sections required the officer to whom the warrant was directed to levy upon the property upon which the assessment remains unpaid, and make his return of that sold, then the plaintiff's contention might be tenable, but since they require him to levy upon the lot or part thereof, and specify in his return the amount for which each lot or part thereof sold, these requirements should have been observed as exceptions to the general law referred to in section 107. The reason usually assigned for the separate levy and sale of property for delinquent taxes is that it enures to the benefit of the owner, so that he can redeem a part of the property sold in case he is not able to redeem the whole, a right which he could not exercise if the property were sold *en masse*. The reason for the rule being so patent, any exception thereto should appear by legislative enactment, and not by judicial construction, and inasmuch as the charter does not positively provide for such an exception to the general rule, it ought not to be applied in this case. The code of West Virginia required the sheriff, in making sales of real property for delinquent taxes, to certify to the recorder, within ten days after such sale, a list of property sold to the state for want of other purchasers; and it was made the duty of the recorder, within twenty days after the return, to record the same, and transmit the original to the state auditor. In *De Forest v. Thompson*, 40 Fed. 375, it appeared that a sheriff, after having made such sales to the state, failed to return the list within ten days, and that the recorder failed to note the time when the return was made. Mr. Justice JACKSON, in deciding this case, said: "The neglect of officers to

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comply with either is such an irregularity as tends to prejudice the rights of the owner whose lands have been sold. He had a right to call at the office and demand the production of the officers' report for his examination. If he discovered it was not there within the prescribed time, or, being there, had not been filed within the time prescribed by the statute, or that the recorder had failed to note the filing of the same, he could rest upon his rights, feeling assured that the steps taken to sell his realty did not divest him of the title to it."

5. The requirement of section 126, to return the amount for which each lot or part thereof was sold was mandatory upon the person executing the warrant, and a failure to do so rendered the sale and deed executed in pursuance thereof void: *De Forest v. Thompson*, 40 Fed. 375; *Simpson v. Edmiston*, 23 W. Va. 675.

Section 135 of the charter provides that in case of a delinquent tax levied upon real property in the name of an owner unknown, the warrant shall be executed by levying upon each lot or part thereof of said property for the tax due thereon, and for the sale of such lots or parts thereof separately. Appellant contends that this section provides, by implication, that when the owner is known, as in the case at bar, a separate levy and sale is not required. It is unnecessary to pass upon this question since section 135 applies to the collection of a delinquent tax levied for general or municipal purposes only, and not for the collection of an assessment for local improvements.

The judgment therefore will be affirmed.

AFFIRMED.

Points decided.

[Decided December 26, 1893.]

FLEISCHNER v. CITIZENS' INVESTMENT CO.

[S. C. 35 Pac. Rep. 174.]

25	119
28	128

25	119
134	402

25	119
187	423

1. **LANDLORD AND TENANT—RESPONSIBILITY FOR NUISANCE—IMPLIED COVENANTS OF LEASE.**—A landlord out of possession is not responsible for a nuisance originating after the execution of the lease, unless he is in some manner at fault for its creation or continuance. In the absence of a covenant to repair it is the duty of the tenant, under the implied covenants of the lease, to so use the property as to avoid the necessity for repairs, (*Powell v. Dayton R. R. Co.* 16 Or. 33, cited,) and if the property was in good condition when demised, and leased for a purpose that would not create a nuisance, the landlord is not liable for the creation or maintenance of a nuisance on the leased premises.
2. **LANDLORD AND TENANT—LEASE—RENEWAL.**—A lease for a given period with the privilege of extending for an additional term is, if the privilege is accepted, a lease for the entire time; the additional term is not a new demise, but a continuation of the old one.
3. **NUISANCE—LANDLORD AND TENANT.**—A landlord who renews a lease upon the creation of a nuisance upon the premises thereby becomes chargeable for its continuance.
4. **NUISANCE—JURISDICTION OF EQUITY—CODE, §§ 333, 330.**—The remedy provided by section 333 of Hill's Code, in cases of nuisance, is not exclusive, and does not limit the remedy for nuisances to actions at law; whenever a nuisance will cause an irreparable injury, or numerous damage actions will be required, equity has "concurrent jurisdiction with courts of law" within the meaning of section 330, Hill's Code, and will enjoin the continuance of the objectionable conditions. *Parish v. Stephens*, 1 Or. 73; *Luhrs v. Sturtevant*, 10 Or. 170; *Watts v. Foster*, 12 Or. 247; and *Eason v. Wattier*, ante, p. 7, approved and followed.
5. **EQUITY—JURY TRIAL—CONSTITUTION, ARTICLE I., § 17.**—A court of equity which has gained jurisdiction of an action to restrain a private nuisance may render judgment for damages as an incident to the suit for injunction, notwithstanding section 17 of article I. of the state constitution, providing that "in all civil cases the right of trial by jury shall remain inviolate." These words continued to all suits, the right of trial by jury in all cases where it was secured to them by the laws or practices of the courts at the time of the adoption of the constitution, but were not intended to abridge the equity jurisdiction then existing. As equity had jurisdiction to restrain nuisances prior to the adoption of the constitution, the jurisdiction still continues, and the matter of damages is only an incident. *Tribow v.*

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Strawbridge, 7 Or. 156, and *Phipps v. Kelly*, 12 Or. 213, approved and followed.

APPEAL from Multnomah: L. B. STEARNS, Judge.

This is a suit by L. Fleischner against the Citizens' Real Estate & Investment Company to restrain the defendants from maintaining a private nuisance, and for the recovery of the damages resulting therefrom. The facts show that the plaintiff is the owner of lots five, six, and seven, in block twenty, as shown upon the recorded plat of the city of Portland, and that the defendant, the Citizens' Real Estate & Investment Company, a private corporation, is the owner of lot eight in said block, which joins plaintiff's property on the north. On September twenty-eighth, eighteen hundred and eighty-eight, John Donnerberg owned said lot eight, and on that day leased it and the building thereon to Richard Clinton and wife, to be used as a theatre for the term of three years from October first, eighteen hundred and eighty-eight, at the monthly rental of two hundred and fifty dollars. The lease, among other things, provided that it should be optional with the lessees to renew it for a further term of two years after the expiration of the first term, upon the payment of three hundred dollars per month, they agreeing to keep the building in good repair, and to make no improper use of the property, nor sublet it without the written consent of the lessor. On December fifth, eighteen hundred and eighty-nine, the said Donnerberg entered into a contract with the Citizens' Real Estate & Investment Company whereby, in consideration of five thousand dollars paid down, and the payment of twenty thousand dollars, and the execution of a note and mortgage for twenty-five thousand dollars, within six months thereafter, he agreed to execute and deliver to it a warranty deed for said property. Said

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contract further provided that until the deed was executed and delivered, Donnerberg should collect the rents under the lease. On March sixth, eighteen hundred and ninety, said Clinton and wife, with the written consent of Donnerberg, assigned their interest in said lease to F. W. Eagles, as trustee for John Cort. After the lease was assigned, the use of the building as a theatre was abandoned, the first floor was cut up into saloons, stores, shops, and booths, and the second floor partitioned into lodging rooms, and all let to Chinese tenants who placed sinks, closets, and urinals therein, which were so imperfectly connected with the sewer that the slops and liquids therefrom saturated the soil beneath the building. About the time these changes were made the plaintiff commenced to excavate a cellar upon his lots for the purpose of erecting a six-story brick building, and the water, filth, and foul matter from said lot eight poured into the excavation to such an extent that the work was impeded, whereupon the tenants and landlord were notified by the chief of police, and temporary relief was obtained, whereby the plaintiff was enabled to erect one story of his building, which was roofed over, with the intention at some future time of completing the other stories. After plaintiff's building was completed, the water and foul matter from the premises occupied by said Chinese percolated through and moistened a portion of his cellar wall about sixty feet long and two and one half feet high, creating a slimy substance thereon that caused foul and noisome odors, rendering the plaintiff's premises unwholesome and sickly, and weakening the said wall.

On July thirty-first, eighteen hundred and ninety, the Citizens' Real Estate & Investment Company made final payment, and received the deed from Donnerberg and wife for said lot, and nine days thereafter commenced suit in the circuit court of the state of Oregon

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for Multnomah County against John Cort, Charles Green, and others, to enjoin them from interfering with the possession of said premises, and a restraining order was issued, but before it could be served upon them, F. W. Eagles and John Cort filed their bill in the circuit court of the United States for the district of Oregon against the said company, and obtained a provisional injunction therein, whereupon said Cort and Green appeared in the state court in the said suit against them, filed a plea in abatement, and upon their motion said suit was dismissed. The Citizens' Real Estate & Investment Company appeared in said suit in the United States court, issues were joined, testimony taken, and on October sixteenth, eighteen hundred and ninety-one, a decree was rendered therein enjoining and restraining said corporation from interfering with said premises until the expiration of said lease. After the said decree was rendered the corporation secured possession of a portion of the premises claimed by it, and commenced an action in the state court against the tenants in possession of said lot, whereupon said F. W. Eagles, John Cort, and one Sigmund Schwabacher, who had acquired some interest therein, appeared in said action, and, being substituted for the tenants, filed their petition and bond for the removal of said cause, and it was by order of the court removed to the federal court, where, upon a trial of the issues, judgment was rendered against the corporation, from which it appealed. Pending the appeal a compromise was effected, and under the option provided in the contract, the corporation executed a lease to said Eagles and others, whereby, in consideration of the payment of four hundred dollars per month, it demised to them said premises for a term to expire December thirty-first, eighteen hundred and ninety-two, and said appeal was dismissed.

Argument of counsel.

The plaintiff alleges the existence of the nuisance, and its effect upon his building; that he had notified the defendants to abate it, but that they had failed to do so, and that in consequence thereof his property had been damaged in the sum of three thousand dollars, and prayed that said nuisance be abated, the defendants prohibited from continuing it, and for his damages. The Citizens' Real Estate & Investment Company, after denying the allegations of the complaint, allege the facts hereinbefore recited. The testimony having been taken and submitted, the court rendered a decree in favor of the plaintiff for the abatement of the nuisance, and awarded him five hundred dollars' damages, from which the company alone appeals.

AFFIRMED.

Mr. Albert H. Tanner (Messrs. John H. Mitchell and Hiram E. Mitchell on the brief), for Appellant.

There is an implied covenant in every lease that the tenant will keep the premises in repair, or in other words, where there is no covenant in the lease on the part of the landlord to repair, the duty to keep the premises in repair is upon the tenant: *Powell v. Dayton R. R. Co.* 16 Or. 33, 8 Am. St. Rep. 251; *Ward v. Fagan*, 101 Mo. 659, 20 Am. St. Rep. 650 and note, 10 L. R. A. 147; *Tomle v. Hampton*, 129 Ill. 379; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223; *Mullen v. Ramear*, 45 N. J. L. 520.

During all the times mentioned in the complaint and down to the trial of this case, the premises were in the actual and exclusive possession of tenants, who had covenanted to keep the premises in repair. In such cases the tenant and not the landlord is liable for creating or maintaining any nuisance that may exist upon the premises: *Fellows v. Gilhuber*, 82 Wis. 639; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672; *Ahern v. Steele*, 125 N. Y. 203, 12 Am. St. Rep. 778, 5 L. R. A. 449; *Kenney v. Barns*,

Argument of counsel.

67 Mich. 336; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Chindelbeck v. Moon*, 32 Ohio St. 2641; *Wonder v. McLean*, 134 Pa. St. 702; *Gillihan v. Chicago R. R. Co.* 19 Mo. App. 411; *Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622; *Abbott v. Jackson*, 84 Me. 449; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255. This company, under these authorities, was not liable for damages herein for the reason that whatever damage respondent sustained was occasioned by the acts of the tenants, and not by the acts of the landlord.

The landlord is only liable where he knowingly lets premises with a nuisance *per se* attached to them, and a lease shortening up the term of a former lease, which the landlord had no power to determine, is not such a reletting as would render the landlord liable: *Waggoner v. Jermaine*, 3 Denio, 306, 45 Am. Dec. 474; *Woodfall's Landlord and Tenant* (13th Ed.), 735; 1 Addison on Torts (Wood's Edition), § 283; *Gaudy v. Jubber*, 9 Best & S. 15; Ray's Negligence, 65; *Tomle v. Hampton*, 129 Ill. 379.

The landlord is not liable for injuries sustained by third persons if the tenant's use of the premises is what causes the nuisance: *Ahern v. Steele*, 115 N. Y. 212, 5 L. R. A. 449, 12 Am. St. Rep. 778; *Gaudy v. Jubber*, 9 Best & Smith (Eng. Q. B.), 15; *Wonder v. McLean*, 134 Pa. St. 334.

Before a landlord will be liable for letting premises with a nuisance thereon, it must be shown that he had notice that there was a nuisance on the premises, or that they were in a ruinous condition at the time of the letting: *Conhocton Stone Road v. Buffalo R. R.* 51 N. Y. 573; *Ahern v. Steele*, 115 N. Y. 212, 5 L. R. A. 449, 12 Am. St. Rep. 778; Cooley on Torts, pp. 608-11.

A court of equity, under the constitution and laws of this state, has no right or jurisdiction to assess damages for the alleged nuisance, and the judgment of the court

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in this case assessing damages against the appellant for five hundred dollars is erroneous: *Hill's Code*, § 333; *Phipps v. Kelly*, 12 Or. 213; *Smith v. Gardner*, 12 Or. 221; *Parker v. Manufacturing Co.* 2 Black, U. S. 545; *Hudson v. Caryl*, 44 N. Y. 553; *Stowbridge v. Tribou*, 7 Or. 156; *Van Norden v. Morton*, 99 U. S. 378; *Pomeroy's Equity*, § 175; *Adams' Equity*, §§ 439, 441.

Mr. Wirt Minor (Messrs. *Lewis B. Cox* and *Joseph N. Teal* on the brief), for Respondent.

The owner of the property is liable in damages if he erected the nuisance or continues it after it has been erected or caused: *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Shepard v. Brown*, 40 Ill. 428; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Morris Canal Co. v. Ryerson*, 27 N. J. Law, 457; *Woodman v. Tufts*, 9 N. H. 88; *House v. Metcalf*, 27 Conn. 631; *Tate v. Mo. Ry. Co.* 64 Mo. 149; *Smith v. Elliott*, 9 Pa. St. 345.

When a landlord leases premises with a nuisance *per se* attached to them, and an injury results to a stranger without his fault, the landlord is liable: *Waggoner v. Jermaine*, 3 Denio, 306; *Reichenbacher v. Pahmeyer*, 8 Ill. App. 217; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Brady v. Weeks*, 3 Barb. 157; *Staples v. Spring*, 10 Mass. 74; *Morris Canal Co. v. Ryerson*, 27 N. J. Law, 457.

The defendant is liable for the further reason that with full knowledge of the nuisance complained of it has accepted rent from the objectionable tenants: *Stephani v. Brown*, 40 Ill. 428.

Opinion by MR. JUSTICE MOORE.

1. The appellant contends that the execution of the lease on December fourteenth, eighteen hundred and ninety-one, was not a reletting of the premises, and that it

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is not liable for any of the damages sustained by plaintiff. The authorities are uniform in holding that a landlord out of possession is not responsible for a nuisance occurring after the execution of the lease, unless he is in some manner at fault for its creation or continuance: *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188. When the landlord has not covenanted to keep the premises in repair, the duty is imposed upon the tenant, under the implied covenants of the lease, to so use the property as to avoid the necessity for repairs: *Powell v. Dayton R. Co.* 16 Or. 33, 8 Am. St. Rep. 25, 16 Pac. 863; and in such cases, if the property was in good condition at the time of the demise, and leased for a purpose that would not create a nuisance, the tenant, and not the landlord, is liable to third persons for injury from the creation or maintenance of any nuisance upon the leased premises: *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422. The reason for this rule is put upon the theory that the lease gives to the tenant the exclusive possession of the premises, and thereby excludes the landlord's right of entry; and, his right of entry and possession being suspended during the term, it follows that his liabilities in respect to the possession are also suspended, except as to such defects in the premises at the time of the demise as might in the manner of their use produce injury to third persons. The general rule of law is that the tenant, and not the owner, is responsible for injuries received in consequence of a failure to keep the premises in repair. To this general rule the authorities recognize these exceptions: (1) When the landlord has, by an express agreement between the tenant and himself, agreed to keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over against the landlord. Then, to avoid circuity of action, the party injured by the defeat and want of repair may have his action in

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the first instance against the landlord. (2) When the premises are let with a nuisance upon them, by means of which the injury complained of is received. (3) Where a landlord rents premises for a purpose which in the very nature of things would become a public nuisance: *Manufacturing Co. v. Lindsay*, 10 Ill. App. 583; *Wood, Nuisances*, § 73.

2. The lease from John Donnerberg to Richard Clinton and wife, under which the tenants claimed possession until the execution of the new one, contained an express covenant that the lessees would keep the buildings in repair. The evidence shows that the premises were in good repair when Clinton went into possession, and also in good repair at the time the deed from Donnerberg and wife was executed and delivered to the Citizens' Real Estate & Investment Company; that the use for a theatre was a lawful one and would not in its nature cause the place to become a public nuisance; but that thereafter the assignee of the lease, without the consent, and against the protest, of the owner, sublet the premises to Chinese tenants, who created the nuisance that caused the injury. Under this state of facts, if no new lease had been executed, it is clear by all the authorities the company would not have been liable for any injury arising from a use of the property by the tenants. The lease from Donnerberg to Clinton contained a provision that the lessees, at their option, might have the privilege of continuing in possession of the premises for two years after the expiration of the first term, upon the payment of three hundred dollars per month. This was a covenant that passed with the land, (*Wood, Landlord & Tenant*, 666,) and upon the exercise of the option, and performance of the conditions precedent by the lessees, a court of equity would have decreed a specific performance of the covenant by the lessor, (*Id.* 27,) and this option, when

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exercised, created a valid lease for five years, and such additional term is not a new demise, but a continuation of the old one, (*Id.* 675,) and hence the term did not expire on the first day of October, eighteen hundred and ninety-one, nor until two years thereafter. On December fourteenth, eighteen hundred and ninety-one, after the Citizens' Real Estate & Investment Company had failed in the state and federal courts to gain possession of the premises, and realizing that it would probably be impossible to do so before the term had expired, it compromised with the lessees, and executed a new lease by which the tenants were permitted to continue in possession until December thirty-first, eighteen hundred and ninety-two, upon the payment of four hundred dollars per month. By the terms of this lease the lessees paid the owner thirteen hundred dollars more than the first agreement required, and the term was shortened ten months. This was taking a new lease, the legal effect of which was the surrender of the old one: *Taylor, Landlord & Tenant*, § 340.

3. Upon the surrender of the old lease, the company was invested with the right of entry, and as the nuisance was in existence upon the premises, it must be presumed to have been aware of the fact, and hence it is liable for its continuance under the exception to the general rule that it had demised premises with a nuisance then in existence thereon. The law is well settled that if the tenant creates a nuisance upon the premises during the term, by an unusual or extraordinary use thereof, although the landlord cannot be made chargeable for the consequences in the first instance, yet, if he subsequently renews the lease with the nuisance thereon, he becomes chargeable for its continuance: *Roswell v. Prior*, 2 Salk. 460; *Whalan v. Gloucester*, 4 Hun, 24.

4. Section 333, Hill's Code, substantially provides

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that any person whose property is affected by a private nuisance may maintain an action at law for damages therefor, and if judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance; and if it appear that such remedy is inadequate, the plaintiff may proceed in equity to have the defendant enjoined. From this the appellant contends that the statute furnishes a complete and adequate remedy at law, and for that reason a court of equity could acquire no jurisdiction, except as auxiliary in aid of the legal action. Section 380 of said Code further provides, that "the enforcement or protection of a private right, or the prevention of, or redress for, an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law; and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this chapter." The chapter containing this section nowhere provides that courts of equity shall not entertain jurisdiction to enjoin a nuisance, and this court has, upon the theory that "courts of equity have been used to exercise concurrent jurisdiction with courts of law" in such cases, fully established the rule that when a person has sustained irreparable injury, or will be compelled to bring a multiplicity of actions to recover the damage, he may invoke the aid of a court of equity, and obtain an injunction to prevent the continuance of a private nuisance: *Parrish v. Stephens*, 1 Or. 73; *Luhrs v. Sturtevant*, 10 Or. 170; *Watts v. Foster*, 12 Or. 247, 17 Pac. Rep. 24; *Essex v. Wattier*, 25 Or. 7, 34 Pac. 756. Courts of equity, then, have concurrent jurisdiction with courts of law in certain cases to prevent the maintenance or continuance of a

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nuisance. It should be invoked, however, only where the injury complained of is irreparable, such as the destruction of property, or when it menaces the life or health of the plaintiff or of his family, or where the guilty party is not able to respond in damages for the injury. But when compensation for the injury caused by a private nuisance is the gist of the complaint, the remedy is by action at law for the damages. In the case at bar it is alleged that the water, slops, filth, and other matter from the sinks, closets, and urinals penetrated the plaintiff's cellar wall, and caused noxious and offensive pools to form in the cellar, and a slimy substance to gather along the walls, thereby tainting and corrupting the premises, and rendering them unfit for occupation. This allegation is fully supported by the evidence, and was sufficient to warrant the court in granting the injunction.

5. The court, then, having jurisdiction of the cause for the purpose of granting the injunction, could it, in view of section 17 of article I. of the constitution, which provides that, "In all civil cases the right of trial by jury shall remain inviolate," award damages for injury resulting from the nuisance? The English rule was that the court of chancery having jurisdiction for the purpose of granting the injunction, will prevent the circuitry and expense of two trials, one in equity for an injunction and one at law for damages, and although it cannot decree damages for the plaintiff's loss, it will substitute an account of the defendant's profits: *Adams, Eq. 219*; and that this rule applied to cases of nuisance: *Id. 208*. This rule probably proceeds upon the theory that the tort may be waived, the defendant treated as an involuntary trustee for plaintiff's benefit, and required to account for the profits he has made out of the maintenance of the nuisance; and yet there must be many

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cases in which no profit has been realized by the defendant, and for that reason the plaintiff would be without remedy in equity. The better rule, though it is not universal, seems to be embraced in the doctrine that if a court of equity acquires either exclusive or concurrent jurisdiction it may go on to complete adjudication, and establish purely legal rights, and grant legal remedies, which would otherwise be beyond the scope of its authority: Pomeroy, Equity Jurisprudence, § 181. This principle has been applied to cases in which a court of equity had obtained jurisdiction for the purpose of granting an injunction to restrain a private nuisance, and, having obtained jurisdiction for the purpose of awarding the special relief, the court retained the cause, and decreed full and final relief, including damages and abatement of whatever caused the nuisance: *Id.* § 237. "As an incident to the relief by injunction, courts of equity will in proper cases consider and settle the question of damages; but no bill will be entertained merely for the purpose of settling damages, that being regarded as the proper practice of the courts at law": *Bassett v. Salisbury Mfg. Co.* 43 N. H. 249. "A court of equity," says ORTON, J., in a suit to abate a nuisance, "having otherwise jurisdiction of the case, can award the damages as well as a court of law": *Brickner Woolen Mills Co. v. Henry et al.* 73 Wis. 229, 40 N. W. 809.

Courts of equity in this state, prior to the adoption of the constitution, had exercised concurrent jurisdiction with courts of law in cases of private nuisance: *Parrish v. Stevens*, 1 Or. 73. In *Tribou v. Stroubridge*, 7 Or. 156, BOISE, J., interpreting this section 17 of article I. of the constitution, said: "This language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practices of the courts at

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the time of the adoption of the constitution," and held that as the practice prior to the adoption permitted a court of law to refer long accounts for computation, the right to do so continued, notwithstanding the prohibition of the constitution. In *Phipps v. Kelly*, 12 Or. 213, 6 Pac. Rep. 707, it was held that where a court of equity originally had jurisdiction of any class of cases for which the proceedings at common law did not then afford an adequate remedy, such jurisdiction will not be lost by reason of subsequent legislation conferring jurisdiction on a court of law to decide such cases, unless there are negative words excluding the jurisdiction of equity. It is true that there was a complete remedy at common law in cases of private nuisance prior to the adoption of section 333 of Hill's Code, but since that section has no words negating the jurisdiction of equity, and as in certain cases equity had jurisdiction to enjoin a private nuisance prior to the adoption of the constitution, it follows that the court had authority to render judgment for the damages as an incident to the suit for an injunction. The appellant, then, is liable in damages for some amount, and as this is difficult of ascertainment, and, as no positive rule can be established as a measure, we see no error in the court's allowance of the amount awarded, and for that reason the decree is affirmed.

AFFIRMED.

Points decided.

[Argued November 20; decided December 26, 1893.]

LEWIS v. CITY OF PORTLAND.

[S. C. 35 Pac. 256; 22 L. R. A. 736.]

25	133
38	84
38	222

25	133
40	248
40	354

1. **DEDICATION OF STREET—DONATION LAND LAW.**—A dedication for a street of a strip of the public domain, made before the passage of the donation law, is not binding on one who subsequently, under such law, acquires title to a tract containing the strip so dedicated.

2. **DEDICATION OF STREETS BY REFERENCE TO MAPS OR PLATS—ESTOPPEL.**—An owner of a tract of land is not estopped from denying that a certain strip of land is a street merely because he deeded lots in said tract by reference to the name under which the tract was platted, and a lithographic map in general circulation in that community showed the strip in question to be a street, where it appears that there were several maps of the addition, and it is not shown that the owner ever knew of or recognized the lithographic map.¹

3. **IDEM.**—Where an owner of a tract of land, having platted part of it, showing that a certain strip is not a street, afterwards files a plat of an addition to his first plat, and for the purpose of showing its position relative to the land before platted, extends in blank, without names or numbers, the blocks and streets of the first plat, and on this blank extension shows the same strip of land to be a street, he does not dedicate such strip for a street, since the dedication on the second map is only of the new land thereon platted.

4. **DEDICATION OF STREET—INTENTION—USER.**—A dedication of land to public use rests entirely on the intent or assent of the owner, and when the evidence of it rests in parol it must be of such a deliberate and decisive character as to leave no doubt of the owner's intention. *Hogue v. Albina*, 20 Or. 185, cited and approved.

5. **EVIDENCE OF DEDICATION BY USER.**²—Though a passage way to a wharf was used by the public without objection for over twenty years, such fact does not show a dedication by user, where the owner always claimed to own the way, maintained a gate at the mouth of it part of

¹NOTE.—This same question was similarly decided in the case of *Sullivan v. Davis*, 29 Kan. pp. 31-33, though it was there shown that the owners of the land were well aware of the existence and general use of the lithographic map, and of the fact that the land in question appeared thereon as having been platted, when, in fact, it was still acreage.—REPORTER.

²NOTE.—The question of dedication by either permissive or adverse use is discussed but not decided in *Smith v. Gardner*, 12 Or. 221.—REPORTER.

Points decided.

the time, improved it, and kept it in repair, and exercised general control over it.

6. TITLE OF THE STATE TO TIDE AND SUBMERGED LANDS.¹—On the admission of Oregon into the union the tide lands, and submerged lands lying between the upland and navigable waters in the fresh-water rivers of the state, became its property, and subject to its jurisdiction and disposal; and the state has the right to use or dispose of its title in any manner it may choose, free from any easement of the upland owners therein except such as the state may choose to allow them, and subject always to the paramount right of navigation, and the uses of commerce. *Bowlby v. Shively*, 22 Or. 410, approved and followed.
7. RIGHTS OF RIPARIAN PROPRIETORS ON NAVIGABLE STREAMS—SUBMERGED LANDS—WHARF RIGHTS.—In view of the fact that the state has provided for the sale of its tide lands, but has not legislated on the subject of submerged lands lying between the uplands and the navigable waters of the rivers of the state, and that the act of October twenty-first, eighteen hundred and seventy-six (Laws, 1876, p. 70), grants to the upland owners the tide or overflowed land adjacent to such upland on the Coos, Coquille, and Willamette Rivers, and in view of the further fact that the custom has always prevailed in this state, and without legislative interference, for the upland owner to wharf out in front of his property to navigable water, and in view of the tendency of the decisions of the courts as shown in *Minto*

¹ NOTE.—The entire field of authorities relating to the question of the title to submerged lands in fresh-water navigable rivers has been thoroughly and exhaustively explored by Mr. Justice GRAY in the case of *Shively v. Bowlby*,—U. S. —, 14 Sup. Ct. Rep. 548, affirming the decision of Mr. Justice LORD, reported in 22 Or. 410. In introducing the question, the court says: "The briefs submitted in the case at bar have been so able and elaborate, and have disclosed such a diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high-water mark of navigable waters, that this appears to the court to be a fit occasion for a full review of those decisions, and a consideration of other authorities upon the subject." The cases of *Shively v. Bowlby*, 152 U. S. 1, and the following, with the elaborate notes attached to them, contain substantially all the law relating to the wharf rights of riparian owners in the absence of constitutional or statutory regulations or prohibitions. *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510; *Miller v. Mendenhall*, 19 Am. St. Rep. 219, 8 L. R. A. 89, 43 Minn. 95; *Hastings v. Grimsshaw* (Mass.), 12 L. R. A. 617; *Prior v. Swarts*, 36 Am. St. Rep. 333, 18 L. R. A. 668, 62 Conn. 132.

Eisenbach v. Hatfield, 12 L. R. A. 617, 2 Wash. 236, clearly shows the difference between the cases decided in states where the riparian rights have been settled by legislation, as in Washington, and those in states where the matter is left open to be settled on common-law principles, as in Oregon.—REPORTER.

Statement of the case.

v. Delaney, 7 Or. 337, and *Parker v. Rogers*, 8 Or. 190, to recognize in riparian owners on the navigable rivers rights in submerged lands that do not belong to the public generally, the court feels justified in holding that riparian proprietors on the navigable rivers of the state who have built wharves out to navigable water in front of their upland have rights of private property therein that cannot be taken for public use except after due compensation being made therefor in the manner established by law.

8. RIPARIAN PROPRIETORS—WHARF RIGHTS UNDER SECTION 4227, HILL'S CODE—CONSTITUTIONAL LAW.—The object of section 4227, Hill's Code, which authorizes the owners of land lying upon navigable streams, and within the limits of incorporated cities to construct wharves thereon, and extend them out to navigable water, being to encourage the building of wharves in aid of navigation and commerce, riparian owners on navigable streams, who, before the passage of the section, had built wharves on such upland, acquired, within the spirit and intent of said section, property in such wharves which cannot be taken for public use without just compensation.

9. VESTED RIGHTS IN WHARVES ON NAVIGABLE STREAMS—CONSTITUTIONAL LAW.—Riparian owners who have built wharves out to the navigable waters of fresh-water streams, with the implied license and permission of the state, and within the spirit and intent of section 4227, Hill's Code, giving to upland proprietors on navigable streams, and within the limits of any incorporated city, the right to build wharves in front of their holdings out to navigable water, have acquired vested rights in such wharf properties that cannot be taken for public use without compensation.¹

APPEAL from Multnomah: HARTWELL HURLEY, Judge.

This is a suit in equity brought by Cicero H. Lewis, Henry F. Allen, partners as Allen & Lewis, and Mary H. Couch, Geo. H. Flanders, and W. S. Ladd against the City of Portland and others and to restrain them from appropriating to public use without compensation to the owners thereof a strip of land at the foot of Burnside Street in said city. The complaint, *inter alia*, alleges that the

¹NOTE.—That riparian rights and wharf privileges are property which cannot be taken away without compensation is shown in the case of *Rumsey v. New York & New Eng. Ry. Co.* 133 N. Y. 79, 23 Am. St. Rep. 600, 15 L. R. A. 618; *City of Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123.—REPORTER.

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plaintiffs are the owners in fee simple and in possession of certain lots therein described, having adjacent thereto several warehouses, and are also the owners in fee of a strip of land at the foot of Burnside Street, sixty feet wide, between Front Street and the Willamette River, and of the wharf located thereon extending to the navigable water of such river; that the defendants C. H. Meussdorffer, M. C. George, W. M. Ladd, J. L. Sperry, E. A. King, C. C. Redman, John Parker, and T. W. Pittinger constituting the bridge commission appointed and acting under the "Meussdorffer Act" (Laws, 1891, p. 634), propose to construct a bridge across the Willamette River from the intersection of Burnside and North Front Streets in the city of Portland, to a point opposite thereto on the east bank of said river, and have let the contract therefor to the defendant, the Bullen Bridge Company, which company is about to commence the work of its construction; that the defendants propose to place the approach to and abutment for the west end of such bridge upon said strip of land, and to appropriate the same to public use, without any compensation to its owners, and without taking any steps to acquire the title, or any right to occupy, or use said land and, that, unless restrained, they will proceed with the construction of said bridge, and wholly deprive the plaintiffs of their property without compensation therefor, and also permanently obstruct the use of said wharf, and the extensions thereof north and south of the proposed site of said bridge to their great and irreparable injury.

The answer denies, on information and belief, that the plaintiffs are the owners of said property, and affirmatively alleges as a defense (1) that the strip of land in controversy is a part of Burnside Street by virtue of a dedication under certain maps and plats made and filed by John H. Couch between the years of eighteen hundred and fifty-

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nine and eighteen hundred and sixty-nine, showing the extension of said street to the Willamette River; that the said John H. Couch, his wife Caroline, and these plaintiffs, exhibited the same to intending purchasers, and sold lots and blocks with special reference to such maps and plats; that the *locus in quo* is a part of the wife's half of the John H. Couch donation land claim, and that his wife, Caroline Couch, after his death, and the plaintiffs after her death, sold and conveyed to divers persons sundry lots and blocks and parts thereof with particular reference to said plats and maps, and thereby approved and ratified the act of John H. Couch in making and filing the same: And alleges (2) as a further defense that the *locus in quo* has been constantly used by the public as a street for more than twenty years last past, with the knowledge and consent of the plaintiffs, their ancestors, predecessors, and grantors, and that the public thereby acquired a prescriptive right to use and occupy the same as a street. The reply denies the allegations in the answer, except that the *locus in quo* is in that half of the donation land claim set apart to Caroline Couch, etc. From this statement it will be seen that the main questions involved and to be determined are: (1) Has there been a dedication of the *locus in quo* as a public street? (2) Have the plaintiffs a right to erect and maintain at the *locus in quo* a wharf extending to the navigable water of the Willamette River?

At the trial it was stipulated, *inter alia*: 1. That the land in controversy is situated within the corporate limits of the city of Portland, Oregon, and is a part of the wife's half of the donation land claim of John H. Couch and Caroline Couch, his wife. 2. That John H. Couch died in January, eighteen hundred and seventy, and Caroline Couch in July, eighteen hundred and eighty-five. 3. That plaintiffs are the owners of the land in controversy and

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running to high-water mark in the Willamette River, unless it shall be found that said land is a public street.

4. That on the nineteenth day of January, eighteen hundred and sixty-five, the said John H. Couch filed in the clerk's office of the county of Multnomah for record, a map purporting to be a map of Couch's Addition to the city of Portland, and purporting to dedicate the streets and alleys marked thereon to the use of the public, which map comprised a plat of land included wholly within the limits of Caroline Couch's half of said donation land claim. A copy of said map is attached and marked exhibit "A."

5. That on the twenty-second day of June, eighteen hundred and sixty-nine, the said John H. Couch filed in the said clerk's office for record a map designated thereon as a map of an extension to Couch's Addition to the city of Portland, comprising a part of land partly within said Caroline H. Couch's half of said claim and partly within John H. Couch's, a copy of which map and the writings thereon are attached and marked exhibit "D."

6. That John H. Couch filed in the year eighteen hundred and sixty-nine, a map purporting to be a map of an extension of Couch's Addition, and that lots and blocks or parts thereof embraced in said extension were sold by John H. Couch and wife to various persons between the date of the filing of said plat and the plat subsequently filed by Caroline Couch and the heirs of John H. Couch, on the — day of November, eighteen hundred and seventy-two, plaintiff, however, not waiving proof of the sale of any lots or blocks on said Burnside Street between said dates.

7. That on the sixteenth day of November, eighteen hundred and seventy-two, Caroline Couch, the widow, and — heirs of said John H. and Caroline Couch, filed a map in said clerk's office for record, purporting to be a map of Couch's Addition to the city of Portland, and purporting to dedicate the streets

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marked thereon to the use of the public, which map comprised land partly said Caroline's half of said claim, and which map is attached and marked exhibit "C."

It was also stipulated that after June fifteenth, eighteen hundred and seventy-two, the widow and heirs of John H. Couch conveyed sundry lots and blocks shown on said maps, describing them as being "in John H. Couch's Addition to the city of Portland * * * according to the maps and plats of said Couch's Addition," and that some of the property so conveyed first appeared as lots on the map of eighteen hundred and sixty-nine, exhibit "D"; and further that between eighteen hundred and fifty-nine and eighteen hundred and sixty-nine, Captain Couch and wife signed and delivered to purchasers of lots in said tract a number of deeds wherein the property conveyed was similarly described.

The testimony having been taken before Francis D. Chamberlain, Esq., special referee, the questions involved were elaborately argued before Judge Hurley, who rendered an extended written opinion fully sustaining the claims of the plaintiffs, and granting an injunction as prayed for, from which defendants appeal.

AFFIRMED.

Messrs. Jarvis V. Beach, corporation counsel, and *Martin L. Pipes* (*Messrs. John W. Whalley and Reuben S. Strahan* on the brief), for Appellants.

Evidence of Dedication.—It is undisputed, that the predecessors of the Couch heirs, plaintiffs here, claiming to own the south half of the disputed tract, executed deeds to various persons, conveying lots and blocks in Couch's Addition to the city of Portland, "according to the maps or plats of such addition," at different times, from eighteen hundred and fifty to eighteen hundred and and fifty-nine. During that time no map or plat of such

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addition was on file or record among the records of the county. The map referred to in the deeds was a private map. Such a map was referred to in a deed exhibited to the court on the hearing, which map was made on April twenty-third, eighteen hundred and fifty. That map, having been made before the donation law was passed, would not of itself amount to a dedication, but deeds made with reference to it after that law was passed and after the Couchs got title to the land would amount to a dedication. We have made a *prima facie* case that this private map did dedicate the disputed tract as a street. We offer a lithographic copy of a map showing such dedication, made in eighteen hundred and fifty-nine, and in general use in this city, and that it was the only map in general use in the city. That map purports to be compiled from other maps. It is itself more than thirty years old and entitled to the presumptions of an ancient document. This evidence authorizes the inference that it is a correct copy of the private map to which we have referred. The inference is disputable, certainly, but the burden is upon the other side to dispute the inference by producing their private map or showing its loss. We prove that deeds were made by the Couchs from eighteen hundred and fifty-nine to eighteen hundred and sixty-five, the time when this lithographic map was the only public map, referring to maps of the said addition. At that time no map had been filed or recorded. This is a recognition of the public map, and that the deeds mentioned were made with reference to it and that this map is itself a dedication.

If we are correct in the foregoing, then neither the map of eighteen hundred and sixty-five nor the map of eighteen hundred and seventy-two could close this street; the dedication had been made and accepted, and was irrevocable. But the map of eighteen hundred and

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sixty-nine shows clearly a dedication of this street. Its effect is two-fold: (a) It is evidence tending to show that the maps used prior thereto opened the street to the river, because it purports, as counsel for plaintiffs agree, to be an outline copy of a preëxisting map. It is fair to presume that it was a copy of the map of eighteen hundred and fifty or of the lithographic map of eighteen hundred and fifty-nine. So far, then, it corroborates our evidence and contention as to those earlier maps. (b) But this map of eighteen hundred and sixty-nine, and the deeds made with reference to it, contribute in themselves a dedication. The deeds were made by all the plaintiffs claiming this land except Mr. Allen. The deeds necessarily referred to this map, because they conveyed lots and blocks that appear on no other map. The only answer to this is that the outline part of the map was only intended to show the relation of the new block to the old addition. Granted. That includes the statement that it was intended to show to intending purchasers of the new blocks that there were streets in the old addition; that the extension was connected with the system of streets of the old addition; that the purchasers would have the advantage of the streets marked on that outline part of the map; that the whole plat, old and new, constituted one addition. The outline map was drawn to exhibit an advantage to the extension by reason of the streets shown on it. Then every street was exhibited thereon for that purpose, B Street to the river, as well as the rest. If this map was not to have that effect, what was that street shown for on that outline map?

As further corroborating the foregoing evidence of dedication, we confidently refer to the whole oral evidence in the case. It clearly appears that the street has been thrown open to the public for forty years. It has been used just as other streets similarly situated have

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been used. None of the acts, as the storing of iron, or the keeping of a gate at the entrance of the wharf, relied on by plaintiffs, are inconsistent with the public use. In any view, they were too slight, too infrequent, and too inconsequential to be considered. Plaintiffs admit that the public was invited over that way during all these years. By their own act the plaintiffs made this parcel of ground a part of their public business, and impressed upon it the stamp of publicity, just as completely as they could have done by an express statutory dedication. Is not forty years of continuous use by the public sufficient? *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Elliott, Roads and Streets*, 125; 2 Dill. Mun. Corp. 631, 2 Greenl. Ev. §§ 537-546.

A conveyance by the owner with reference to a plat or map dedicates all the streets shown thereon irrevocably: *Lounsdale v. Portland*, 1 Or. 397, 5 Am. & Eng. Enc. Law, 405, and notes; *Florentine v. Barton*, 69 U. S. 2 Wall. 57, 17 L. Ed. 783; *Portland v. Whittle*, 3 Or. 126; *Carter v. Portland*, 4 Or. 339.

If the owner open the street and the public use it, it is enough to dedicate: *Woodyer v. Hadden*, 5 Taunt. 125; *Chapin v. State*, 24 Conn. 236; *Green v. Oakes*, 17 Ill. 249; *Connehan v. Ford*, 9 Wis. 240.

From the use by the public with the assent of the owner, the law presumes a dedication: *Macon v. Franklin*, 12 Ga. 239; *Eastman v. Lamprey*, 12 Minn. 89; *Cady v. Conger*, 19 N. Y. 256.

Right to Maintain the Wharf.—This state owns the bed of all navigable rivers, and of all bays, inlets, and estuaries within her borders, by virtue of her sovereignty: *Eisenbach v. Hatfield*, 12 L. R. A. 632, *et seq.*, 2 Wash. 236; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 65, 21 L. Ed. 802; *Hardin v. Jordan*, 140 U. S. 376, 35 L. Ed. 431, 32 Cent. L. J. 297; *McManus v. Carmichael*, 3 Iowa, 1; *Barney*

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v. *Keokuk*, 94 U. S. 338, 24 L. Ed. 228. Under these authorities a riparian owner has no right or interest whatever in the water. His "control stops with the shore"; that is, the line of high-water. The title to the very spot upon which the wharf stands, being in the state, the erection is wrongful, unless a grant from the state be shown: *Gould on Waters*, § 27.

The plaintiffs also claim under the provisions of an ordinance of the city of Portland. The authority for this was the act of October seventeenth, eighteen hundred and sixty-two, compiled in Vol. 2, Hill's Code, as §§ 4227, 4228, and an ordinance of the city defining the wharf limits, and prescribing regulations for the construction of wharves. But the plaintiffs can claim nothing under this act. It was enacted long after the wharf was built. This statute operates prospectively, and can have no retroactive force. The legislature might have given it a retroactive effect, so as to legalize wharfs already constructed, but it did not. This statute was held in *Bowlby v. Shively*, 22 Or. 410, to be simply permissive, and not to vest any right until exercised; and further that was simply a license revocable at the pleasure of the legislature until acted upon.

But even if the legislature granted to plaintiffs every right that the state had, still a subsequent legislature could repeal the grant, for no right can be acquired by private parties which can prevent the state from changing the use to which the soil under water shall, in the public interest, be devoted, so long as such change is made to subserve either navigation, commerce, or fishery: *Illinois R. R. Co. v. Illinois*, 146 U. S. 387. The license, if one exists, is revocable: *Rundle v. Delaware & R. Canal Co.* 55 U. S. 14 How. 80, 14 L. Ed. 335; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*,

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9 Watts & S. 9, 42 Am. Dec. 312. By the Meussdorffer act the legislature has impliedly granted this public street for the purpose of a bridge since the committee have selected it for that purpose. The right to build bridges across navigable streams wholly in one state, under the authority granted by the state, can be questioned only by the United States. And it is clear that such bridges are regarded as great aids to commerce: *Gilman v. Philadelphia*, 70 U.S. 3 Wall. 713, 18 L. Ed. 96; *Escanaba Trans. Co. v. Chicago*, 107 U.S. 678, 27 L. Ed. 442; *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 31 L. Ed. 629.

Mr. George H. Williams (Messrs. Charles E. S. Wood, Stewart B. Linthicum, and J. Couch Flanders on the brief), for Respondents.

Evidence of Dedication.—There was a plat of an addition to Portland made by Capt. John H. Couch in April, eighteen hundred and fifty, and it does not appear that there was any other plat of this addition in existence until eighteen hundred and sixty-five. There is no evidence in this case that on the plat of eighteen hundred and fifty the *locus in quo* was dedicated as a public street; but if there was any such dedication, then the persons who subsequently acquired the title from the United States or their grantees had a right to revoke such dedication and claim and use the property as private property: *Lownsdale v. Parrish*, 62 U.S. (21 How.) 290, 16 L. Ed. 80.

The McCormick map is not entitled to any consideration. It does not purport to be a map of Couch's Addition to the city of Portland, and there is no evidence that Captain Couch or his wife ever recognized this map, or, indeed, that they ever saw it. If they knew of its existence, they had no power to do anything with it. There is no evidence that Captain Couch or his wife,

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prior to eighteen hundred and fifty-nine (the date of the McCormick map), ever made any map in which B and C Streets were made to run to the river. *Leland v. Portland*, 2 Or. 46, settled that.

As to the map of eighteen hundred and sixty-nine, we submit that this map does not purport to be—nor could it be understood by the public to be—anything more than a map of an extension of Couch's Addition to the city of Portland. This view is confirmed by the form of the acknowledgment to this map, which reads, in its material part, as follows: * * * "and acknowledged that he recognized the foregoing as a correct description of the lots and blocks laid out by him." This, of course, means the lots and blocks laid out by him on said map, which are designated and marked by a coloring of yellow. All the other property, excepting a tier of blocks adjoining the yellow blocks laid out in eighteen hundred and sixty-seven, is left blank. The only object which Captain Couch could have had in leaving the blocks and lots contained in the maps of eighteen hundred and sixty-five and eighteen hundred and sixty-seven blank in the map of eighteen hundred and sixty-nine, was to show that this map was not intended to effect those maps, but that the numbering of the lots and blocks and the dedication of the streets, outside of the extension by the map of eighteen hundred and sixty-nine, were to remain as by said former maps.

The references or recitals in these deeds do not estop Mrs. Couch or her heirs from claiming the property in question. While recitals in a deed may be used as evidence, they are not conclusive upon the parties to the deeds, except where the deed itself is the foundation of the action or the defense. Mrs. Couch and her heirs have a perfect right to show, notwithstanding what is said in these deeds, that no reference was made to the map of

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eighteen hundred and sixty-nine. If this were an action by some lotholder, whose lot abutted upon some street which had been recognized as a street by the plaintiffs or Mrs. Couch, then a question would arise which does not arise in this case. Here, the public authorities are claiming this property, and the only ground, so far as the writings in the case are concerned, upon which they make their claim, is that in certain deeds there were certain recitals which, as they claim, show that Mrs. Couch knew that the land was dedicated for a street: *Bingham v. Walla Walla*, 3 Wash. Ter. 68; *Bank of America v. Banks*, 101 U. S. 240.

The use of the *locus in quo* by the public in the manner in which it was used is entirely consistent with the claim of ownership by the plaintiffs: *Kirk v. Smith*, 22 U. S. (9 Wheat.) 288, 6 L. Ed. 92.

Dedication is absolutely a question of intention. The evidence must be clear, and show a positive and unmistakable intention to abandon the property to the public: *Hogue v. Albina*, 10 L. R. A. 673, 20 Or. 182; *Holdane v. Cold Spring Trustees*, 21 N. Y. 474; *Smith v. Portland*, 30 Fed. Rep. 734; *Dovaston v. Payne*, 2 Smith's Lead. Cas. Hare & W.'s notes, p. 155; Buswell, Limitations, § 251; Angell, Limitations (6th Ed.), § 398; *Langworthy v. Myers*, 4 Iowa, 42; *Ellicott v. Pearl*, 35 U. S. (10 Pet.) 441, 9 L. Ed. 487; *Ewing v. Burnet*, 36 U. S. (11 Pet.) 50, 9 L. Ed. 628; *Connecticut Mut. L. Ins. Co. v. St. Louis*, 98 Mo. 422; *Wheeler v. Stone*, 55 Mass. 313; *Irwin v. Dixon*, 50 U. S. (9 How.) 11, 13 L. Ed. 25.

Wharf Rights of Plaintiffs.—If the land upon which the plaintiffs' wharf stands between high and low-water mark is tide land, then it is expressly granted and confirmed to the plaintiffs by section 1 of the act of October twenty-first, eighteen hundred and seventy-six, (Laws, 1876, p. 70,) and becomes absolutely their property.

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This act declares that the Willamette River shall not be deemed a river in which the tide ebbs and flows within the meaning of the act, and the supreme court of this state, in the case of *Andrus v. Knott*, 12 Or. 501, decides that the shores of the Willamette River at Portland are not tide lands, and that the law as to the land between high-water mark and low-water mark, where the tide ebbs and flows, is not applicable to the Willamette River at Portland.

Assuming, then, that under the acts of our legislature and the decisions of the supreme court, the Willamette River at Portland is a river in which the tide does not ebb and flow within the ordinary meaning of those terms, we refer to the following cases, holding that the riparian proprietor has a right to build a wharf extending into the river for his own use or for the use of the public, and as far as the necessities of navigation may require: *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497, 19 L. Ed. 984; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 515; Gould, Waters, § 179.

Touching the effect of the act of eighteen hundred and sixty-two, (sections 4227, 4228 of the Code,) we refer to the case of *Parker v. Rogers*, 8 Or. 187, and *Bowlby v. Shively*, 22 Or. 421.

As to the second section of the act of eighteen hundred and sixty-two, (Code, § 4228,) upon which the defendants' counsel seem to rely, we refer to an ordinance of the city of Portland of eighteen hundred and sixty-nine, establishing a wharf line in the Willamette River in front of the city of Portland. So far as the property in question is concerned, the ordinance as to the wharf line reads as follows: "The wharf line of the river front of the city of Portland, is hereby established at and made to conform to the deep water line in this section

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designated, to wit: * * * thence to a point in the center of C Street, and one hundred and ninety-two (192) feet from North Front Street; thence to a point two hundred and forty (240) feet east of Front Street, at the south line of A Street." This would make the wharf line in front of the property in question more than two hundred feet from North Front Street; and therefore this wharf is within the wharf line, as fixed by said ordinance, as the land in dispute and the wharf together, east of Front Street, are two hundred feet wide. Section 2 of said ordinance recognizes the existence of such wharves as had been constructed prior to its enactment by providing that if any such wharves extended beyond the line fixed by the ordinance, they should be changed so as to conform to the requirements thereof; which is an implied recognition of all wharves that were then in existence within the wharf line.

It was suggested that the act of eighteen hundred and sixty-two was only a license and revocable. We think it grants something more than an ordinary license; but if it be simply a license, then it has been executed, and a court of equity will not allow a licensor to revoke an executed license without compensation to the licensee. Washburn on Easements (3d Ed.), p. 680.

We deny, however, that if the act of eighteen hundred and sixty-two was a license, it has been revoked by the act of eighteen hundred and ninety-two, organizing the bridge commission. If the license to Allen & Lewis to keep a wharf in Portland has been revoked, then the licenses to all wharf owners in the city of Portland have been revoked; and, according to the doctrine of the defendants, the public authorities can take and destroy all the wharves in Portland, involving hundreds of thousands of dollars' worth of property, without compensation to the owners.

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Assuming, for the sake of argument, that the land in question has been dedicated for a street, we insist that the defendants have no right to appropriate and obstruct it with the approach to a bridge. It must be admitted that the land in question belongs to the plaintiffs, subject to the public easement, if the land was dedicated, as claimed by defendants; and, therefore, it cannot be subjected to a new servitude, and one not contemplated by the dedication, without the consent of plaintiffs: *Church v. Portland*, 6 L. R. A. 259, 18 Or. 73; *Warren v. Lyons City*, 22 Iowa, 351; *Morrison v. Hinckson*, 87 Ill. 587, 29 Am. Rep. 77; *Price v. Thompson*, 48 Mo. 361.

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1. Before proceeding to a discussion of the questions involved, it may be said that this strip is in Caroline Couch's half of the donation claim, and though there is some evidence that there was a plat made of an addition to the city of Portland by John H. Couch in April, eighteen hundred and fifty, there is nothing to show that the *locus in quo* was dedicated as a public street therein; and even if there was such plat having been made before the donation law was passed, it would not have the effect of constituting a dedication. Any person who should subsequently acquire the title from the government or its grantees, had a right to revoke such dedication, and subject the property to his private use. Nor is there evidence that Couch or his wife, prior to eighteen hundred and fifty-nine,—the date of the McCormick map,—ever made any map on which the *locus in quo* was platted as a street.

2. To establish the proposition that the land in question has been dedicated as a public street, defendants introduced in evidence two plats and maps of Couch's Addition to the city of Portland. The first one is a litho-

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graphic map of Portland, dated eighteen hundred and fifty-nine, made by S. J. McCormick. It shows that Burnside Street extends to the river, and thus includes the strip of land in dispute. The second map was made by John H. Couch on the twenty-second day of June, eighteen hundred and sixty-nine (exhibit D), and purports to be an addition to Couch's Addition which latter had already been laid out. It also shows that Burnside Street extends to the river. On the other hand, plaintiffs have introduced two maps of Couch's Addition to the city of Portland, one made by John H. Couch in eighteen hundred and sixty-five (exhibit A), and the other made by Caroline, his widow, Caroline E. Wilson, Clementine F. Lewis, Elizabeth R. Glisan, Mary H. Couch, his heirs, and George Flanders and Maria L. Flanders, on the fifteenth day of November, eighteen hundred and seventy-two (exhibit C). Both these maps show that Burnside Street terminates at the west side of Front Street, and that the strip of land in controversy is private property. It thus appears, so far as the maps and plats are concerned, that the two introduced by the defendants show that Burnside Street extends to the river, while the two introduced by the plaintiffs show that it terminates at the west side of Front Street. As to the lithographic map of eighteen hundred and fifty-nine, there is no evidence to show, nor is it claimed, that John H. Couch or his wife signed or acknowledged or had anything to do with making it. The point upon which the defendants mainly rely in respect to such map as showing a dedication is that it was in general use in the city, and the only public map referring to Couch's Addition from eighteen hundred and fifty-nine to eighteen hundred and sixty-five, during which time John H. Couch and his wife made certain deeds in which the lots were described by reference to "Couch's Addition to the city of Portland."

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It is argued that the reference in these deeds to Couch's Addition, under the circumstances, was intended to refer to such addition as platted on said map and was therefore a recognition of it, and in legal effect, a dedication of the streets as platted thereon. We are unable to assent to this inference. The admitted facts show that the strip of land in dispute belonged to Caroline Couch as donee of the United States, and that it was conveyed to the plaintiffs Allen & Lewis and Flanders, together with certain lots, some time in eighteen hundred and fifty-four, and that they are now the owners and entitled to the possession of it, unless the public has acquired an easement therein as a street. It is probable that after they acquired the title from the United States, Couch and his wife may have continued to use a prior map, exhibiting it to intending purchasers, and selling their lots with reference to it, but there is nothing to show that Couch or his wife ever recognized the McCormick map, or that they ever saw it, or knew of its existence. In fact, it does not purport to be a map of Couch's Addition to the city of Portland. In view of these considerations we do not think that the reference in their deeds to "Couch's Addition" was intended to refer to their property as platted on the McCormick map.

3. It is not this, however, but the map of eighteen hundred and sixty-nine upon which the defendants mainly rely as establishing a dedication of the *locus in quo* as a public street. It is claimed, that all the plaintiffs, except Mr. Allen, made deeds conveying lots with reference to this map. All that can be said in support of this claim is that these parties made certain deeds, referring therein for description to the "map of Couch's Addition to the city of Portland." But inasmuch as Couch had made a map in eighteen hundred and sixty-five, upon which the *locus in quo* was not platted as a

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part of Burnside Street, even if we assume that the map made by him in eighteen hundred and sixty-nine platted it as a part of such street, there is nothing to show whether the general reference in these deeds was to the map of eighteen hundred and sixty-five or eighteen hundred and sixty-nine. Mrs. Couch, during the time that she was the owner of the land in dispute, never made any maps or plats dedicating it as a public street, nor had any of the plaintiffs. The maps and plats made by John H. Couch, after he and his wife had conveyed this land, as already stated, to the plaintiffs Allen & Lewis and Captain Flanders, would not bind them, unless they accepted and acted upon such maps, and there is no evidence that they accepted and acted upon the map of eighteen hundred and sixty-nine, other than the mere fact that they made certain deeds in which they described the property by reference to the "map of Couch's Addition to the city of Portland," which reference was as likely to be to the map of eighteen hundred and sixty-five, or to some prior map of which there was some evidence, as to that of eighteen hundred and sixty-nine.

It is sought, however, to obviate this objection by showing that some of the deeds conveyed lots and blocks that were for the first time platted on the map of eighteen hundred and sixty-nine, or, in other words, that such deeds conveyed lots and blocks that appear on no other map, and hence it is argued that the reference to them was necessarily to the map of eighteen hundred and sixty-nine, which, it is claimed, shows that the property in dispute was a part of Burnside Street. It is true that such lots and blocks did not appear on any other map, for the reason that the map of eighteen hundred and sixty-nine was intended as an addition or extension of prior maps, but this affords no justification for the assumption or argument that such map, made by John H.

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Couch, shows a dedication of the *locus in quo* as a public street. Before, however, it can be assumed that his wife recognized the map of eighteen hundred and sixty-nine, by joining with her husband in such deeds, as showing a dedication of her property, so as to bind or estop her, such map itself ought to show the dedication so distinctly and positively as to make the evidence of her intention to divest herself of the title entirely clear. The map itself does not purport to be anything more than a map of the extension of Couch's Addition to the city of Portland. The lots and blocks laid out on it, which constitute the new addition, are designated and marked by a coloring of yellow, and all the other property, except a tier of blocks adjoining such yellow portion, is left blank. This indicates that the map of eighteen hundred and sixty-nine was not intended to affect the prior maps. Its object was to plat a second addition, and to show its position relative to the first one. The numbering of the lots and blocks and the dedication of the streets outside of the extension were to remain as platted on the prior maps. This must be so, as it is impossible to convey any lots or blocks by reference to such map, outside of the extension, because they are left in blank, and hence deeds referring to lots and blocks as numbered by map of eighteen hundred and sixty-nine necessarily referred to it, and did not appear on any other map, because such lots and blocks composed the new addition or extension of prior plats, but as we have shown, the other portion of such map negatives the idea that it was intended to change the map of eighteen hundred and sixty-five, or prior maps, or that it undertook to represent the *locus in quo* as a part of Burnside Street. This view is confirmed by the form of acknowledgment to this map, which reads, in its material parts, as follows: "That he recognized the accompanying diagram or plat as a true and correct

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description of lots and blocks laid out by him as an addition to the city of Portland." This, of course, means the lots and blocks laid out on this map as a new addition, indicating that the added blocks copied from prior maps were only intended to show their relative position to such new addition, and not to alter or affect the prior maps. We do not think, therefore, that any representations as to Burnside Street upon that portion of the map left in blank,—such portion constituting no part of the addition,—can be construed as intending to make a dedication of the *locus in quo* to affect the prior maps.

The map of eighteen hundred and seventy-two is the only one that Caroline Couch or the plaintiffs ever signed, and it shows that the property in question is not a part of Burnside Street. This map corresponds with that of eighteen hundred and sixty-five, and, as we construe it, is not in conflict with the map of eighteen hundred and sixty-nine. We do not think, therefore, that such deeds as were made of lots and blocks which appear only in the map of eighteen hundred and sixty-nine, was a dedication of the *locus in quo*, or that they can be reasonably construed to be a recognition of any dedication thereof. In thus holding we do not controvert the principle that where a proprietor recognizes a plat in making a sale of lots he will be estopped to deny a dedication of the streets designated upon the plat embracing his property, but we do not think, in view of the facts, that such principle can be applied to the case at bar.

4. The second defense is dedication by user. It is claimed by the defendants that the *locus in quo* has been used by the public, with the consent of the plaintiffs, the same as other streets similarly situated have been used, for more than twenty years, and that therefore the public has a prescriptive right to the same. A dedication of land to the public use rests on the intention or assent of

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the owner. As it is purely a question of intention, the evidence of it, when resting in parol, must be clear and satisfactory, and indicate a positive and unmistakable intention to devote the property to public use. All the authorities agree that the acts and conduct of the owner, when relied upon to show the dedication of his property, must be deliberate and unequivocal, manifesting a clear intention to abandon such property to the public use. The burden of showing it rests on the defendant. The security of titles requires that the evidence of dedication, when depending on parol proof, should be of such a deliberate and decisive character as to leave no doubt of the owners' intention. Hence, the rule is well settled by numerous authorities that before there can be a valid dedication there must have been an actual intention, clearly indicated, by deliberate and unequivocal words or acts, to dedicate the property to the public: *Hogue v. Albina*, 20 Or. 185, 10 L. R. A. 673, 25 Pac. 386.

5. It appears from the testimony that some time in eighteen hundred and fifty-four, and soon after the plaintiffs Captain Flanders and Allen & Lewis bought the property, they built a wharf in front thereof for ocean vessels and river craft; that it was one of the first wharves built in the city, and for many years was the principal landing for such vessels; that it has been maintained there continuously ever since, although it has been rebuilt several times, and extensions added. The wharf extends across the *locus in quo*, and out from the bank of the river about one hundred feet to the navigable water of such river, and is seven hundred feet in length. A roadway or street was left open from the east side of Front Street to the wharf, for the purpose of ingress and egress. The wharf opposite the street is two-story, and at the time it was built the plaintiffs last mentioned constructed an elevated passage way twenty feet wide on

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the north side of this roadway, from Front Street to the upper story, and enclosed the space underneath, and used it for a stable and storehouse. This roadway or street has been used by the public and plaintiffs as a means of conducting and carrying on the business appertaining to this wharf and warehouse, and the facts indicate that it has not been used for any other purpose. The plaintiffs have at all times maintained their right to the *locus in quo*, consistent with its use as a passage or roadway to and from their wharf, and the use of it by the public for such purpose was not under a claim of right, but by their permission. The city authorities have not exercised any acts of ownership over or assumed any right to control it; nor has the city made any improvements or performed any work upon the same by way of repairs or otherwise, but the evidence shows that the plaintiffs have used and occupied such property to the exclusion of the public, except so far as was necessary for the public to use it in doing business at their wharf. The evidence also shows that the plaintiffs have asserted their ownership of the land in controversy by acts and declarations which are entirely inconsistent with any intention to abandon or dedicate it to the public use. They have used it for the storage of iron, brick, and other heavy freight; they have improved and repaired it; they have kept a gate across it for ten or twelve years; exercised the right to exclude persons or teams from it whenever they chose to do so; they have publicly and repeatedly, in connection with the use of the property, declared that it was not a public street, but a private way to their wharf and warehouse.

In *Irwin v. Dixon et al.* 50 U. S. 9, in which the facts are similar to the case at bar, the court says: "From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his

customers, but no one ever supposed that the property thereby became public instead of private. * * * No length of time, during which property is so used, can deprive an owner of his title. * * * While any one might be allowed to travel over this space from the warehouse to the wharf and river, when convenient and not interfering with the owner, it would not be because it had been intended to give to the public a right of way over these premises, but because he himself intended to travel over it, and while so doing and so leaving it open, would not be captious in preventing others from traveling there." The same principle is laid down in the note to *Dovaston v. Payne*, 2 Smith's Leading Cases, Hare & Wallace's notes, 155, wherein it is said: "If, therefore, a person opens and uses a space upon his own land as a road for his own convenience and purposes, the mere fact that the community are allowed to make use of it in common with him for even twenty or thirty years will not constitute a dedication of it to the public use, especially in the face of declarations on his part inconsistent with an assent to such dedication." So that the use of the *locus in quo* by the public in the manner referred to is entirely inconsistent with the ownership of the plaintiffs, and therefore the public have not acquired a prescriptive right by user to the land in controversy.

6. The next question to be determined is as to the right of the plaintiffs to erect and maintain a wharf at the *locus in quo* extending to the navigable water of the Willamette River. The contention for the defendant is that the title to the soil under the Willamette River is in the state by virtue of its sovereignty, and that riparian owners, without a license or grant from the state, have no authority or right to maintain a wharf beyond the ordinary high-water mark. Hence, they claim that, if the plaintiffs have erected their wharf and extended it

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over the submerged soil of such river to its navigable waters without any license from the state, they have erected a purpresture, which may be abated, or removed, as a common nuisance. The theory of their argument is that in this country the law as to navigable freshwaters is the same as to waters moved by the tide; that, in either case, the state, by virtue of its sovereignty, is the owner of the subjacent soil of its navigable rivers, including tide lands or submerged lands contiguous to deep water; that as such owner, it has the right to regulate the use of such lands, or to dispose of them in any way that will not impair or injuriously affect the public interests in such rivers, especially for purposes of navigation and commerce, free from any easement of the upland owners, who can only acquire the right to extend a wharf over them by its consent, obtained by legislation, or acquired by acquiescence through local usage; and that, as a consequence, unless the plaintiffs, as riparian owners, have obtained the consent of the state to extend their wharf over the submerged soil of the Willamette River to the point of its navigability, they cannot be considered as having any right in the premises which the state is bound to respect; nor can their wharf be recognized as a legal structure, the taking or condemnation of which for a public use would entitle them to compensation as for private property.

By the common law, in England, the title to the shore of the sea, and the arms of the sea, and the soil under tide water, is vested in the king, who has a proprietary interest therein which he may grant or dispose of, subject to the public use for navigation and commerce. "*The jus privatum*," says Lord HALL, "that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to the public use": De

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Jure Maris, 22. The soil so vested in the king can only be transferred subject to the public trust. In this country the state has succeeded to the ownership and sovereignty over such lands, charged with a like public trust; and the law is now regarded as settled that the state, by virtue of its sovereignty, is regarded as the owner of lands covered by tide water, and, as an incident of such ownership, has the right to use or dispose of them in such way as will not impair or prejudice the public interests or privileges, such as fishing, navigation, and commerce. As touching this subject, Mr. Justice FIELD said: "Upon the admission of California into the union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations, or among the several states, the regulation of which was vested in the general government": *Weber v. State Harbor Commissioners*, 85 U. S. 18 Wall. 65. And in *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154, in conformity with our previous adjudications, it was held that when the state of Oregon was admitted into the union the tide lands became its property, and subject to its jurisdiction and disposal; that, in the absence of legislation or usage, the common-law rule would govern the rights of upland proprietors, and by that law the title to such lands is in the state; that the state has the right to use or dispose of its title in such manner as it might deem best, free from any easement of such upland owners therein other than such as the state might choose to resign to them, subject only to the paramount right of navigation, and the uses

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of commerce. The same rule has been extended to our great fresh-water lakes, which, owing to the extended commerce conducted upon them, are treated as inland seas; and also, in some of the states, to the great fresh-water rivers which are navigable in fact, as the Mississippi, the Missouri, the Ohio, and, in the state of Pennsylvania to all its permanent rivers; such rule depending on the law of each state as to what waters, and to what extent, the prerogative of the state over the lands under water shall be exercised. The question, as Mr. Justice BRADLEY said, is one for the several states themselves to determine. "If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections": *Barney v. Keokuk*, 94 U. S. 324. So it appears that the same rule as to the ownership of and the sovereignty over lands under the navigable waters of the great lakes and fresh-water rivers applies which obtains at common law as to the ownership of and sovereignty over lands under tide waters, and that such lands are held by the same right in the one case as the other, and subject to the same trusts and limitations: *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 436, 13 Sup. Ct. 110.

7. In respect to the tide lands, the state, as owner, has provided by legislation for their sale and disposal free from any right of the upland owners therein, except such as it saw fit to recognize in them, or their grantees, in consideration of the fact that prior to such legislation, the tide lands had often been dealt with by the adjacent owners as private property, subject however to the paramount right of navigation and the uses of commerce: *Boulby v. Shively*, 22 Or. 410, 30 Pac. 154. But in respect to navigable fresh-water rivers in this state, there has been no legislation for the sale or disposal of any portion of the submerged lands lying between the upland and

navigable waters. Such lands, so far as any legislative action is concerned, have not been treated by the state in the proprietary way which it has asserted and applied to the tide lands; and some of the decisions of its courts recognize certain rights in the riparian owners, arising from adjacency, which do not belong to them in common with the public. In *Minto v. Delaney*, 7 Or. 337, it was held that the river is the boundary of lands lying along the Willamette, and that accretions formed on the shore by the gradual receding of the water belong to the riparian owner, and in *Moore v. Willamette Transportation Co.* 7 Or. 357, that rocks and shoals along the margin of the same river belong to the riparian owner. While, therefore, the state, as the owner of the submerged lands of navigable fresh-water rivers, has not treated its proprietary interest in any portion of them as subject to sale or disposal, it has recognized certain rights in the riparian owners, not common to the public, in the shoal water in front of their lands.

It is common knowledge that before and after the state was admitted into the union, the riparian owners along the navigable fresh-water streams within its limits acted on the assumption that the right of wharfage was incident to their land, and built wharves in front thereof. Some of these wharves, like the plaintiffs', are expensive structures, and of great advantage and benefit to commerce. Nor is this all. Upon the tidal waters, such owners, believing that the tide lands adjacent to their uplands belonged to them, built wharves over the same, and dealt with them as private property. This condition of things was recognized in the legislation referred to, (Laws, 1876, p. 70,) and in consideration thereof, and as an act of justice, a preference was given to the riparian owners in the provisions for the sale of such land, "though the state was under no legal obligation to recognize the

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rights of either the riparian owner or those who had occupied these tide lands," as BOISE, J., said, "still the legislature, considering the fact that these lands had been dealt with as private property, and improved sometimes by the erection of expensive structures which were a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands, which improvements were in many cases absolutely necessary as aids to commerce": *Parker v. Rogers*, 8 Or. 190. All this goes to show that the custom which obtained of building wharves along the navigable rivers of the state by riparian owners was fully understood, and that there was no intention to interfere or obstruct the right to wharf across the submerged lands on non-tidal or fresh-water rivers, but that the act was only designed to provide for the sale of tide lands on tidal waters, the effect of which was inconsistent with any easement or right of the upland owner therein not granted to him in such act. This becomes all the more apparent by the proviso in the tide land act (*Laws*, 1876, p. 70,) which provides: "That the Willamette, Coquille, and Coos Rivers shall not be deemed rivers in which the tide ebbs and flows, within the meaning of this act, * * * and that the title of this state to any tide or overflowed lands upon said rivers is hereby granted and confirmed to such owner of the adjacent lands." This grant conveyed the title to all such lands along these rivers, whether tide or overflowed, to the riparian owners, subject to the public trust. As the Willamette is a fresh-water river, and only slightly affected by the tides a short distance from its mouth, there is no tide land at Portland, as held in *Andrus v. Knott*, 12 Or. 501, 7 Pac. 763, and therefore it results that if the submerged or overflowed lands described in the act include such as are not affected by the tides, and lie be-

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tween the upland and navigable water, they belong to such owners, subject to the paramount right of navigation and commerce. There is a marked distinction made by such legislation between the submerged lands of fresh navigable waters and those covered by the flux and reflux of the tide, and known as tide lands. In view of these considerations, and the tendency of our adjudications to recognize rights in the riparian owners on the Willamette River that do not belong to the public, and the custom which has prevailed from the early settlement of the country in respect to the building of wharves, it is at least reasonable to infer that the state has acquiesced in the right of the riparian owners to build wharves in aid of navigation. In fact, the absence of legislation in respect to the state's proprietary interest in the shoal water of submerged lands of the Willamette River, taken in connection with the legislation providing for the sale and disposal of tide lands, and adjudications to the effect that the grant of its proprietary interest therein is free from any easement of the riparian owner, and subject only to the public right of navigation and commerce, leads to the conclusion that it is the policy of this state, as of other states, to allow riparian owners on such rivers to build wharves in aid of navigation.

Mr. Gould says: "Riparian owners upon navigable fresh-water rivers and lakes may construct in shoal water in front of their land, wharves, piers, landings, and booms in aid of and not obstructing navigation. This is a riparian right, being dependent upon title to the bank, and not upon title to the river bed. Its exercise may be regulated or prohibited by the state; but so long as it is not prohibited, it is a private right derived from the passive or implied license by the public. As it does not depend upon title to the soil under water, it is equally valid in the states in which the river beds are held to be public

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property and in those in which they are held to belong to the riparian proprietors, *usque ad filum aquæ*." Again, he says: "The legislature may authorize the extension of such structures beyond low-water mark; but if not sanctioned by the legislature, they are illegal, so far as to interfere with or limit the right of navigation": Gould on Waters, § 176. In view of these considerations, the wharf of plaintiffs, being in aid of navigation, is a legal structure and private property, which can only be taken for public use according to established law, and with due compensation therefor.

8. Passing these considerations for the present, there is another phase of the case which seems to be decisive of the assent of the state to the building of plaintiffs' wharf. The legislative assembly, at its session held in eighteen hundred and sixty-two, passed the following act relating to wharves in cities: "Section 4227. The owners of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporate town therein, are hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.—Section 4228. The corporate authorities of the town wherein such wharf or wharves is proposed to be constructed shall have power to regulate the exercise of the privilege or franchise herein granted; and upon the application of the person entitled to and desiring to construct such wharf or wharves such corporate authority shall, by ordinance or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low-water mark, so that such wharf or wharves shall not be con-

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structed any further into such stream or other water beyond such low-water line than may be necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water." In eighteen hundred and sixty-nine, the city of Portland, under the authority of this statute, passed an ordinance defining the wharf limits and regulating the building of the same. Section 3 of this ordinance provides that "all wharves and piles now erected or driven beyond the lines described in section 1 of this ordinance shall be removed to conform to the above described line within ten years from the date of the approval of this ordinance; *provided*, that if any such wharf or structure shall be at any time destroyed by the elements, or so damaged as to necessitate the rebuilding thereof, it shall be rebuilt to conform to said above described lines."

The contention for the defendants is that the plaintiffs' wharf having been already built when the statute was passed did not come within its purview; that the statute provides for the doing of future acts under the regulation of the corporate authorities; that it does not legalize or attempt to legalize wharves theretofore constructed; that the words "proposed to be constructed," and "desiring to construct," and "hereby authorized to construct," show beyond cavil that future and not past erections were what the lawmakers had in mind. The rule undoubtedly is that a statute is to be construed to operate prospectively and not retrospectively, unless the language is so plain and direct as to preclude all question as to the intention of the legislature. The rule is founded on the principle that a construction should not be given to a statute that will take away, or restrict rights, unless the intention of the legislature cannot be otherwise satisfied. A retrospective law is always subject to the limitation that it

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shall not be such as is termed *ex post facto*, or as impair the obligations of contracts. But we do not think there is any occasion to apply the principle suggested to the statute in question. There is no claim that it affects past transactions, or relates back and gives them validity. It is not pretended that the statute has a retroactive effect, and made wharves legal structures which were erected prior to its enactment. The statute neither commands certain acts or things to be done, nor prohibits them from being done. It is a permissive statute, which allows certain things to be done without commanding them. "Under the provision of the statute," said BOISE, J., "any person within an incorporated town within this state may build and maintain a wharf from his land at high-water into navigable water, so far as is necessary or convenient to accommodate shipping, if he conforms to the legal restrictions imposed on him by the authorities of the town, and does not impede navigation. Such structures are erected in all commercial towns, and have been recognized as legal structures in all the states": *Parker v. Taylor*, 7 Or. 446. The statute simply grants permission or license to any upland owner in an incorporated town whose land fronts upon a navigable stream to construct a wharf in front of his land, which permission, when acted upon, renders his wharf a legal structure. Its object is to encourage the building of wharves to aid navigation, and for the benefit of commerce. Within its purport, then, what difference would it make whether the wharf was built before or after the statute was enacted. In either case, the wharf would serve the object it sought to accomplish, and hence be a legal structure within its spirit and intent.

9. But it is argued that the leave granted under the statute, being merely a permission or license, it is revocable at the pleasure of the state; and that, as a conse-

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quence, the wharf of the plaintiffs' ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn, or the license revoked. The statute has not been repealed either directly or by implication, and so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer Act (Laws, 1891,) in that connection is that it,—being for a public purpose,—operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build wharves is merely a license, and, as such, may be revoked at the pleasure of the state, after it has been acted upon, and the wharf erected. This is not so. As was said in *Boulby v. Shively*, 22 Or. 410, the statute does not vest any right until exercised; it is a license revocable at the pleasure of the legislature until acted upon and availed of. It is doubtless true that if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands to deep water, unless acted upon, or availed of, would be revoked. But the riparian owners who have taken advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. Hence, the contention of the defendants that the Meussdorffer Act—which authorizes the location and construction of the Burnside-Street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, cannot be maintained.

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Nor do we find anything in the case of the *Illinois Central R. R. Co. v. State of Illinois*, 146 U. S. 436, in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the court, impaired the public interest in its waters, and operated, if irrevocable, as an abdication by the state of its trust over the property. The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands, subject to the paramount right of navigation and commerce, authorize its use for any purpose inconsistent with the public interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, is in aid of navigation, and for the benefit of commerce. Of course the state has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our state has made such regulations, and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erected in conformity with its requirements, it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year eighteen hundred and seventy-six in conformity with the ordinance, we have not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises. Within the principle and for the reasons suggested, it is apparent that the cases of *Rundle v. Delaware & Raritan Canal Co.* 55 U. S. (14 Howard) 80; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312, do not determine the questions involved in the case at bar. The right to build

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and maintain a wharf, being in aid of navigation and for the benefits of commerce, rests on a different footing and principle from a license to erect mills with dams which may impede or obstruct navigation, or canals diverting the waters of a navigable river. Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor: *Monongahela Nav. Co. v. U. S.* 148 U. S. 312, 13 Sup. Ct. 622.

This decree must be affirmed.

AFFIRMED.

[Argued November 28; decided December 28, 1893.]

BLOCH v. MULTNOMAH COUNTY.

[S. C. 35 Pac. Rep. 30.]

JUROR'S FEES — TALESMEN — Code, § 2348. — A talesman summoned on a special venire from the body of the county acts as a juror within the meaning of section 2348, Hill's Code, and is entitled to his fees, if he attends court in obedience to the process, though he does not serve on the jury; it is otherwise with a talesman summoned from the bystanders.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

The petition of M. M. Bloch states that upon the trial of a certain cause in the circuit court of the state of Oregon for Multnomah County, said court ordered a special venire to issue for persons to act as jurors in said court and cause; that thereupon a special venire was issued by the clerk to the sheriff commanding him to forthwith summon from the body of the county forty persons having the qualification of jurors in said court, and to make

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due return of his acts; that the sheriff, under that authority, served certain persons, and among others one Harry Knott and one J. J. Kadderly, summoning them to appear as jurors; that they did appear, and having been sworn on their *voir dire*, and examined as jurors, were, by order of the circuit court, excused from serving. It is further alleged that they each were required to travel, in order to attend the court, two miles in going and returning, and that accordingly they each were entitled to be paid as fees and mileage for their attendance the sum of two dollars and twenty cents; that the claim has been assigned to the petitioner, Bloch. And for a further ground of petition it is set forth that upon the same venire one William Moreland was likewise summoned and attended the court, and traveled two miles, but was excused without being sworn as a juror in the cause, upon his *voir dire*, or otherwise, and that this claim, also amounting to two dollars and twenty cents, has been assigned to the petitioner. The county court refused to allow the claims when presented on the ground that the persons summoned had not acted as jurors within the meaning of section 2348, Hill's Code. The circuit court having sustained this ruling, the petitioner appeals.

REVERSED.

Mr. Emmett B. Williams (*Messrs. Richard Williams* and *Chas. H. Carey* on the brief), for Appellants.

Mr. John H. Hall (*Messrs. Geo. E. Chamberlain*, Attorney-General, *Wilson T. Hume*, District Attorney, and *Joseph J. Fitzgerald* on the brief), for Respondents.

Opinion by MR. JUSTICE BEAN.

The only question for consideration in this case is whether a person summoned on a special venire from the

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body of the county to complete a jury in a case on trial, who attends court in obedience to the process, is entitled to juror's fees under the statute, if he does not serve on the jury. The statute provides that a juror's fees for "attendance upon a court of record" shall be two dollars per day, and that a talesman acting as a juror is entitled to the same per diem as one regularly summoned: Code, § 2348. It will be observed that the law does not require that a talesman shall serve on a jury before he is entitled to the per diem, but that acting as a juror shall be sufficient. The contention for the defendant is that, although a person summoned from the body of the county on a special venire may attend court in obedience to its process, he does not act as a juror unless he is accepted and sworn in the particular case for which he has been summoned. We are unable to concur in this view. The law authorizes the court, if a sufficient number of jurors cannot be obtained from the regular panel, to order the sheriff to summon as many qualified persons as may be necessary to complete the jury, either from the bystanders or the body of the county. When a talesman is thus summoned from the bystanders, it is manifest he can in no sense be said to be acting as a juror unless he is accepted and serves on the jury. His presence in court is his own voluntary act, and not pursuant to any process of the court, nor by its order. He is not deprived of any time, nor caused any loss or damage by simply being called and examined on his *voir dire*; but when he is summoned from the body of the county on a special venire he is compelled to neglect his own private business to attend court as a juror only in obedience to its order, however inconvenient it may be to him, and often at considerable trouble and expense, and when he does so we think he is acting as a juror within the meaning of the law and entitled to compensation as such, although he may not actually serve on the jury.

Statement of the case.

Citizens are not infrequently summoned on a special venire for jury duty from distant parts of a county, and compelled, at considerable expense and loss of time, to attend court, and there remain until excused, and it is but a matter of simple justice that they should be paid a reasonable compensation for their services. In the absence of an express declaration of the statute, we are unwilling to hold that such persons are not acting as jurors within the meaning of section 2348, and not entitled to compensation as such. The judgment of the court below will therefore be reversed, and the cause remanded.

REVERSED.

[Argued November 9; decided December 26, 1893.]

STATE v. ADAMS.

[S. C. 22 L. R. A. 840; 35 Pac. Rep. 36.]

SEDUCTION UNDER PROMISE OF MARRIAGE—CODE, § 1863.—Where a woman yields her virtue to a man relying upon his promise to marry her in case she becomes pregnant from the act, she is not seduced "under promise of marriage"; these words contemplate that the seduction must be accomplished by means of an absolute promise of marriage, or one that becomes absolute the moment the woman yields.

APPEAL from Multnomah: M. G. MONLY, Judge.

A. J. Adams was convicted of the seduction of Amelia Nobbs under a promise of marriage, contrary to the provisions of section 1863, Hill's Code, and appeals.

AFFIRMED.

Mr. Martin L. Pipes (Messrs. John W. Whalley, and Reuben S. Strahan on the brief), for Appellant.

Messrs. Geo. E. Chamberlain, Attorney-General, and *Wilson T. Hume*, District Attorney, for Respondent.

Opinion by MR. JUSTICE BEAN.

The evidence shows that the prosecutrix, who is about twenty-seven years of age, came to Portland in January, eighteen hundred and ninety-one, from Council Bluffs, in Iowa, where some two years before she had been acquainted with defendant and had kept company with him for a few months. In April or May after her arrival in Portland, she again met the defendant on several occasions at the home of a mutual friend, where she was accustomed to visit, and was frequently accompanied by him on her return after these visits to the place where she was working as a domestic. On one of these occasions, in either April or May, eighteen hundred and ninety-one, the defendant solicited her to go with him to Portland Heights, to which she first objected, but finally consented, and, after arriving at the end of the car line, they walked around the heights and what occurred, as told in her own language, is, that "He teased me and teased me, until he induced me to give up to him. He said if he hurt me in any way he would see me through and marry me. If he got me in a family way he would marry me. I told him my intention was not to marry at all. He promised if he hurt me, if he got me in any different way, he would see me through, or see that I was cared for and do what was right; promised just as much as to say, 'I will marry you.' Said he never would hurt me. He promised both before and after that if he hurt me in any way he would see me through, and see that I was taken care of, just as much as to say, 'I will marry you.'" The immoral relations thus established continued at frequent intervals until a few months before the trial, in July, eighteen hundred and ninety-three, and resulted in pregnancy, and the birth of a stillborn child on the fourth of May, eighteen hundred and ninety-three.

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The only evidence given on the trial of a promise of marriage, or of the seduction, was that of the prosecutrix, as above detailed, and which defendant contends is insufficient to prove the crime charged, because, as he contends, seduction accomplished under a promise of marriage to be performed only on condition that pregnancy results from the intercourse, is not within the statute. The statute (Hill's Code, § 1863) provides that "If any person, under promise of marriage, shall seduce and have illicit intercourse with any unmarried female of previous chaste character, such person, upon conviction, shall be punished, etc. A subsequent marriage of the parties is a defense to the violation of this section." It will be observed that mere illicit intercourse is not an offense under this statute, nor is seduction alone made a crime, but the seduction under a subsisting promise of marriage of an unmarried woman of previous chaste character. The gist of the offense is that the seduction shall be accomplished under or by means of a promise of marriage which is unfulfilled. Without the promise there can be no crime under this statute, however reprehensible the conduct of the man may be. A promise of marriage, and her reliance upon it, must be the means of inducing the woman to surrender her virtue. She must be drawn aside from the path of virtue she is then pursuing, and induced to yield to the solicitations of her seducer, by means of and under the influence of a promise of marriage, upon the performance of which she in good faith had a right to rely. Nothing less will satisfy this statute. Its object is not to punish illicit intercourse, but to punish the seducer who by means of a promise of marriage destroys the chastity of an unmarried female of previous chaste character, and who thus draws her aside from the path of virtue and rectitude, and then fails and refuses to fulfil his promise. It is, however, not necessary that

the promise should be technically valid to sustain a civil action for breach of promise; and, although it may be conditioned upon immediate intercourse, thus rendering it void in a civil proceeding because founded upon an immoral consideration, it is still held sufficient to sustain a criminal prosecution if the woman in good faith relied upon it and was thereby deceived: *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644; *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211; *People v. DeFore*, 64 Mich. 693, 8 Am. St. Rep. 863, 31 N. W. Rep. 585. In such case, the mutual promise of the woman is implied from her yielding to the solicitations of her seducer under his promise of marriage, and the promise becomes absolute. But when the seduction is accomplished by means of a promise of marriage, to be performed only upon the condition that the intercourse results in pregnancy, no promise of the woman can be implied from such yielding, and it seems to us the contract smacks too much of a corrupt and licentious bargain to fall within the statute. How can it be claimed that a pure minded woman is led astray and her ruin accomplished under a promise of marriage which, with her assent, amounts to nothing more than a mutual agreement to engage in illicit relations so long as pregnancy does not result, and which neither party expects nor intends shall be fulfilled except upon the happening of an event which may never occur? Take the case of a woman who yields under a promise of marriage by a married man, to be performed on the death of his wife, could it be seriously contended that such a case would be within the statute? And yet it is difficult to conceive any difference in principle between the case suggested and the one at bar.

The statute is not intended as an act to punish a man who prevails upon a woman to gratify his lust by a prom-

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ise of marriage of such a character. Its plain object is to protect the innocent and confiding from being betrayed, and surrendering to their destroyers all that is estimable in woman, under the belief, based upon what she supposes to be an honorable proposal of marriage, to be performed in any event, that to yield is but to anticipate the time when the act will be lawful. Its design is to protect the chaste woman from the assaults of a wicked and designing man, who makes use of the most potent of all seductive arts to win the love and confidence of a woman by professions of love and marriage, and not to protect one who is willing to gratify her own lustful desires, stipulating only that if her shame is likely to become exposed it shall be shielded by marriage. It recognizes that a woman, confiding in what she supposes to be an honorable promise of a future marriage, and relying upon it, is peculiarly defenseless against the solicitations and persuasions of him to whom she is betrothed, and has consequently provided for the punishment of him who, by means of such a promise, is guilty of betraying that confidence to the utter ruin and disgrace of the female, and the scandal of society. It was passed in the interests of good morals, and not as a cover for licentiousness. The words "under promise of marriage, seduce," it seems to us, manifestly contemplate that the seduction must be accomplished by means of an absolute promise of marriage, or one which becomes absolute the moment the woman yields. Any other construction would defeat the purpose of the statute, and render it a cover for licentiousness. In this case the improper relations continued between the prosecutrix and defendant, apparently without objection on her part, for more than a year after she is alleged to have been seduced, and yet during all that time there was no subsisting promise of marriage. The defendant, under such circumstances, was guilty of no crime

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for which he could be punished under the statute, for the condition upon which his promise was to be performed had not happened, and there was consequently no broken promise for which he could be punished. The object of the statute is not to punish one who seduces a woman and then marries her, but to punish one who uses the promise as a means of inducing the woman to submit to his lustful desires, and, after his purpose is accomplished, abandons his victim to her disgrace and shame. If the prosecutrix was seduced at all, it was at the time the first connection took place, but there was no promise of marriage then, for the contingency upon which it was to become absolute did not happen until long after, and consequently the promise did not precede the intercourse, which is essential to constitute the crime.

The only case cited, or which we have been able to find, on the question presented by this record, is *People v. Hustis*, 32 Hun, 58, in which two of the three judges of the second department of the supreme court of the state of New York, in a very brief opinion, held that seduction accomplished under a promise of marriage conditioned on pregnancy resulting thereafter is within a statute similar to ours. This decision seems to have been based upon the proposition that the question had already been decided by the court of appeals in *Kenyon v. People*, 26 N. Y. 203, and in *Boyce v. People*, 55 N. Y. 644, but neither of these cases goes to the extent of holding the doctrine for which they are cited, only holding that a promise of marriage on condition of immediate intercourse is sufficient, because the law implies a mutual promise by the woman from her yielding, and, the condition thereby being fulfilled, the promise becomes absolute. But when the promise is conditional, depending on pregnancy, the condition may never happen, and consequently the defendant may never be under any

 Points decided.

obligation to marry the prosecutrix. He is not under a promise to marry at the time of the seduction, and may in fact never be. And hence it seems to us the cases referred to do not sustain the doctrine announced in *People v. Hustis*, and we are unwilling to regard that case as controlling authority.

This conclusion renders unnecessary an examination of any of the other questions raised on this appeal, and the judgment of the court below is therefore reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion.

REVERSED.

[Argued November 9; decided December 26, 1898.]

STATE v. KOSHLAND.

[S. C. 35 Pac. Rep. 32.]

1. CONSTITUTIONAL LAW—TITLE OF ACT—CONSTITUTION, ARTICLE IV., § 20.
—The fact that a statute entitled "An act to regulate warehousemen, * * * and to declare the effect of warehouse receipts," and making it a crime to issue warehouse receipts for goods not in store, provides for a penalty for its violation, does not render it obnoxious to the constitutional prohibition against acts embracing subjects not expressed in the title.
2. WAREHOUSE RECEIPTS—INDICTMENT UNDER SECTIONS 4201 AND 4207. HILL'S CODE.—Section 4201, Hill's Code, makes it "the duty of every person owning, controlling, managing, or operating a warehouse or other place where grain * * * or other product or commodity is stored," to deliver a receipt correctly stating the quantity received, and section 4207 provides a penalty for violating section 4201. An indictment charged that the defendant was engaged in keeping, controlling, operating, and managing, as owner, a warehouse, and was doing business as a warehouseman, and alleged that, being such warehouseman, he feloniously and unlawfully issued and delivered to the owner of certain pelts a receipt for a greater number of sheepskins than he had in store. *Held*, that the indictment was defective because it could not be determined therefrom whether the warehouse in question was one of those mentioned in the statute, and this notwithstanding it appears on the face of the indictment that the defendant kept, managed,

25	178
136	182

25	178
37	489

25	178
40	276

25	178
41	523

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and operated the warehouse in which the sheepskins in question were stored.

8. **NEGOTIABILITY OF WAREHOUSE RECEIPTS**—CODE, § 4201.—The warehouse receipts required by section 4201, Hill's Code, to be given for commodities stored in warehouses are negotiable regardless of their form.

APPEAL from Multnomah: M. G. MUNLY, Judge.

The defendant, M. Koshland, was indicted for the crime of issuing a warehouse receipt for goods not actually in store. So much of the indictment as is necessary to a proper understanding of the case is as follows:—

"The said M. Koshland, on the twenty-eighth day of February, in the year eighteen hundred and ninety-three, in the county of Multnomah and state of Oregon, was then and there engaged in keeping, controlling, managing, and operating, as owner, a warehouse, and was then and there doing business as such warehouseman, under the name of Koshland Bros., and, being such warehouseman as aforesaid, he, the said M. Koshland, did then and there unlawfully and feloniously issue and deliver to the Bank of British Columbia, a corporation, then and there the owner of the sheepskins described therein, a warehouse receipt, of which the following is a copy:—

"No. 736.

"'KOSHLAND BROS.' WAREHOUSE,

"'PORTLAND, Oregon, February 28, 1893. }

"Received of the Bank of British Columbia, in good order, thirty-six thousand nine hundred and fourteen sheepskins, marked —, for account of the Bank of British Columbia, on the following conditions: Held for storage at the rate —. For any fractional part of a month the charge for storage will be the same as for a whole month. Loss or damage from fire, flood, rats, other animals, insects, or the elements, if any, at owner's risk. No delivery to be made until this receipt is returned properly indorsed.

KOSHLAND BROS.'

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“That, in truth and in fact, at the time of the issuance of said receipt as aforesaid by the said M. Koshland, the said M. Koshland had not actually in store thirty-six thousand nine hundred and fourteen sheepskins, as provided for in said warehouse receipt, nor had he actually in store at the said time any greater amount of sheepskins, as provided for in said warehouse receipt, than thirty-six hundred and sixty-five sheepskins, all of which acts were then and there done by the said M. Koshland with intent on his part to injure and defraud the Bank of British Columbia, a corporation as aforesaid, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon.”

To this indictment the defendant demurred, alleging insufficiency of its facts to constitute a crime, and, the demurrer being overruled, the defendant entered a plea of not guilty. A trial was thereupon had, resulting in a verdict of guilty as charged in the indictment, upon which the court sentenced him to pay a fine of four thousand dollars, or stand committed until such fine was paid.

REVERSED.

Messrs. John W. Whalley, Reuben S. Strahan and Martin L. Pipes, for Appellant.

Messrs. George E. Chamberlain, Attorney-General, and Wilson T. Hume, District Attorney, for the State.

Opinion by MR. CHIEF JUSTICE LORD.

The record discloses that a number of objections were made to the indictment, and exceptions taken to the admission of testimony, to the instructions of the court, and to the refusal of the court to give the instructions asked by the defendant. At the outset it is claimed that the act under which the defendant was indicted, tried,

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and convicted is contrary to section 20, article IV., of the state constitution, which provides that "Every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title," and is therefore unconstitutional and void. It is entitled "An act to regulate warehousemen, wharfingers, commission men, and other bailees, and to declare the effect of warehouse receipts." The ground of this objection is that neither the penalty nor the civil remedy provided by section 7 of the act are mentioned in the title, and hence that such section should be eliminated from the act, because it embraces matters not expressed in the title. This court, as well as the courts of all the states where a like constitutional provision exists, have given it a very liberal interpretation, and have endeavored to avoid that strictness of construction which would unnecessarily limit or cripple legislative enactments, and defeat the beneficial purpose for which such provision was adopted. Its object was to prevent the blending of incongruous subjects in the same act, and using the title as a deception: *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. Rep. 174. This object is attained if the subject matter of the statute is germane to the title. "The insertion in a law of matters," said GILFILLAN, C. J., "which may not be verbally indicated by the title, if suggested by it, or connected with, or proper to, the more full accomplishment of the object so indicated, is held to be in accordance with its spirit": *State ex rel. Stuart v. Kinsella*, 14 Minn. 525. Hence, if the matters embraced in the act are congruous, and have a proper relation to each other, and are not foreign to the subject expressed in the title, the requirements of the

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provision are not violated. The object of the statute, as expressed in the title, is "to regulate warehousemen, etc., and to declare the effect of warehouse receipts." The act prescribes and regulates the duties of warehousemen, and to secure performance of such duties so as to promote honesty and prevent fraud, it provides by section 7 a penalty for the violation of its provisions. That section, therefore, is not only germane to, and connected with, the subject of the act, but is essential to the accomplishment of the object indicated by the title; hence such section is not within the evil which the constitutional provision was intended to exclude.

2. It is also claimed that the indictment is defective for the further reason that the term "warehouse," as used, is not of itself a sufficient description of the place of storage to bring the defendant within the statute as a warehouseman. The first section of the statute is set forth in Hill's Code as follows: "Section 4201. It shall be the duty of every person keeping, controlling, managing, or operating, as owner, or agent, or superintendent of any company or corporation, any warehouse, commission house, forwarding house, mill, wharf, or other place where grain, flour, pork, beef, wool, or other produce or commodity is stored, to deliver to the owner of such grain, flour, pork, beef, wool, produce, or commodity a warehouse receipt therefor, which receipt shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, the number of bushels or pounds, the condition or quality of the same, and the terms and conditions upon which it is stored." In view of this language it is claimed that the defendant should be charged in the indictment with being a warehouseman who kept a warehouse "where grain, flour, pork, beef, wool, or other produce or commodity was stored," so as to show that the alleged warehouse which the defend-

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ant kept came within the specification or descriptive words of said section, and that he was a warehouseman within the purview of the statute, and as such became subject to the duties imposed, and to the penalty prescribed for a violation of its provisions; for it is argued that it is not to be intended as a matter of law that a warehouse is a place where all or any of these particular products or commodities are stored, and, therefore, before the defendant can be made subject to the duties imposed by the statute, the indictment must allege such a description of the place of storage as will constitute him a warehouseman within the meaning of the statute. An indictment should charge the crime of which the defendant is accused with such precision and fullness as to inform him of the nature of his offense. Its allegations should make it certain that the act charged is forbidden by the statute. A statute prescribing what shall constitute an offense must necessarily be in general terms, and the office of the indictment is to make an application of its provisions to the case in hand. As a general rule, an indictment is sufficient if it follows the language of the statute, and clearly apprises the accused of the offense charged: *State v. Shaw*, 22 Or. 287, 29 Pac. Rep. 1028.

The indictment charges the defendant with operating as owner, a warehouse, and with being a warehouseman, and that as such he issued the warehouse receipt for the sheepskins as set out therein, when in fact, at the time of its issuance, he did not have them actually in store, nor any part thereof, except as alleged. But it does not charge the defendant with operating a warehouse for the storage of sheepskins or other commodity. It is true that one who operates, as owner, a warehouse is a warehouseman. The law defines a warehouse to be a building or place adapted to the reception and storage of goods and merchandise, and a warehouseman to be one

Opinion of the court—LORD, C. J.

who receives such goods and merchandise to be stored in his warehouse for compensation or profit. But while the law defines what is a "warehouse," and necessarily what constitutes a "warehouse," this does not relieve the state of the necessity of specifying that the warehouse which the defendant is charged with operating as owner was for the storage of sheepskins and other commodities for which it is alleged he gave a warehouse receipt. All the law intends is that a "warehouse" is a place for the storage of goods, but what kind of goods, or produce, or commodity, for which it is kept or used as a place of storage by a party is not within its intendment. We cannot, therefore, infer, as a matter of law, that the defendant kept or operated a warehouse for the storage of sheepskins or any other particular commodity. That is a matter to be specified, and, when so specified, the face of the indictment will disclose whether the alleged warehouse which the defendant is charged with operating was for the storage of any of the commodities enumerated in the statute. The statute makes it the duty of one who keeps a warehouse for the storage of grain, flour, or other commodity, to deliver to the owner of such grain, or commodity, a warehouse receipt therefor, which duty he violates when he issues such receipt for goods not actually in store; so that when a defendant is charged with operating a warehouse, whether for the storage of grain, sheepskins, or other commodity, the indictment should so specify in order to apprise him—other sufficient allegations appearing—of the nature of his offense. If the defendant kept a warehouse for the storage of sheepskins, and it was so alleged, then the question of whether the word "commodity" in the statute is broad enough to include "sheepskins," would be properly before the court for its determination. As the warehouse which the defendant is charged with operating as owner is not

alleged to be a warehouse for the storage of grain, flour, or other commodity enumerated in the statute, we think the demurrer on this point was well taken.

3. Another question raised by the demurer is, as to whether it is the intention of the statute to make such receipts negotiable without regard to form. Upon this question the trial court held that the statute did not require such receipts to have a negotiable quality, and, therefore, that such receipt, although not negotiable in form, was sufficient, or within the statute. Section 4201, Hill's Code, among other things, provides that a warehouse receipt delivered to the owner of the commodity stored "shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, the number of bushels or pounds, the condition or quality of the same, and the terms and condition upon which it is stored." It will be observed that there is nothing in these requirements to indicate that such receipts shall have a negotiable quality. Section 5 of said statute, being section 4205 of the Code, provides that "All checks or receipts given by any person operating any warehouse or commission house, etc., are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made in blank or to the order of another." It thus appears that the statute, after prescribing that the receipt shall contain certain requisites or characteristics, none of which are of a negotiable character, proceeds to declare that such receipts are negotiable and that they may be transferred "by indorsement of the party to whose order" such receipt was given or issued. There can be no doubt that if this section was cut short after declaring such instrument negotiable, it would have imparted the quality of negotia-

Opinion of the court—LORD, C. J.

bility to them without regard to their form. But it is the use of the subsequent language in that connection—"to whose order such receipt was issued"—which indicates that they must be negotiable in form. Such language assumes that the receipt given by the warehouseman to the owner of the commodity stored is subject to his order. Upon this implication it is assumed that it was intended such warehouse receipts should be negotiable in form, otherwise the language of the statute would be that such receipts may be transferred by the indorsement of the party to whom they were issued, instead "of the part to whose order they were issued." It is insisted that this language means something, and is intended to have some effect, and that to give it the effect which its legal meaning imports, the conclusion is inevitable that such receipt must be negotiable in form in conformity with the rule that paper, to be negotiable, must contain negotiable words. The argument for the defendant, then, may be thus summarized: That warehouse receipts or bills of lading which the statute declares to be negotiable, are the same instruments which are made transferable by the indorsement of the party to whose order they are issued, and that, as these latter words imply that such receipts or bills of lading should be negotiable in form, their identity is fixed as the same instruments which are claimed to be negotiable; hence the statute only contemplates the issuance of warehouse receipts or bills of lading that contain negotiable words, or are negotiable in form. Without doubt the rule is well settled that every word and clause of a statute should, if possible, have assigned to it a meaning, leaving no useless words; but its application is always subordinate to the legislative intent, and is only to be followed so far as, and when it contributes to such result: Bishop on Written Law, § 82. The words of a statute must always yield to its manifest purpose.

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Words loosely or unnecessarily used cannot change such purpose where the true intent is manifest in the statute itself. It will always be presumed that the legislature intended exceptions to its language when in conflict with the general object of the statute. The reason of the law in such case should prevail over the letter. The object of the statute, as declared in its title, is "to regulate warehousemen, wharfingers, and other bailees," and "to declare the effect of warehouse receipts." As warehousemen, wharfingers, etc., were enabled, after they had obtained possession of goods, or other commodities, and thus the *indicia* of ownership, to transfer them in fraud of the rights of the owners, there was a necessity for the regulation of the business in which such persons were engaged, and to declare the effect of the receipts or checks which they issue to such owner. There was, then, an existing evil which needed to be remedied by such legislative regulations as would prevent the issue of false receipts or checks, and punish fraudulent transfers of property by warehousemen, wharfingers, and others.

To aid in effecting this object, and to facilitate the transfer of stored goods or commodities, all warehouse receipts are declared to be negotiable. The statute requires warehousemen or wharfingers to issue receipts or vouchers for goods or commodities stored, containing certain requisites specified, none of which include the quality of negotiability, and, after prohibiting them from issuing any false receipts or vouchers, or for goods not actually in store, etc., it declares such receipts so issued by them to be negotiable and transferable by indorsement. In declaring such receipts to be negotiable the statute necessarily meant and referred to the receipt or voucher which the warehouseman or wharfinger had issued to the owner of the goods or commodities stored. This receipt is made transferable by indorsement of such

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owner to whom issued, and as it is not required to have any negotiable quality, it is immaterial whether or not it be negotiable in form. Such receipts may be transferred by indorsement of the party to whom, or "to whose order" it was issued, and is within the statute. They are required to be the true representative of goods or commodities actually in store, and their issuance is prohibited under any other conditions or circumstances. The aim of the statute was to facilitate the transfer of stored goods, and its purpose was to protect the holders of warehouse receipts from imposition and fraud. It was designed to protect the community as well as the holder of such receipts or vouchers. By making such receipts issued by warehousemen negotiable, and transferable by indorsement of the party to whom they are issued, a valid transfer of the property represented in such receipt is effected, and, as such endorsement may be in blank, or to the order of another, they may thus pass from hand to hand. Hence the implications arising from the words "to whose order" do not limit the statute to such receipts as are only negotiable in form, when its clear purpose was to make any receipt issued by a warehouseman or wharfinger for the storage of grain or other commodity negotiable without regard to form. For the reasons, however, suggested the judgment is reversed, and the cause remanded for such further proceedings as may be just and proper, not inconsistent with this opinion.

REVERSED.

Statement of the case.

[Argued December 5, 1893; decided January 3, 1894.]

DAVIS v. BOWMAN.

[S. C. 25 Pac. 264.]

PRIORITIES BETWEEN CHATTEL MORTGAGES.¹—Where chattel mortgages are made in good faith and for a valuable consideration, and possession is not delivered, their priority is determined by the time of their execution, and not by the time of their filing, since by subdivision 40 of section 776, Hill's Code, there is only a rebuttable presumption of fraud against an unrecorded mortgage, which does not exist when the mortgage is either admitted or proven to be *bona fide*. *Pittcock v. Jordan*, 19 Or. 8, overruled; *Marks v. Miller*, 21 Or. 317, approved and followed.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

The plaintiff, H. E. Davis, brought an action against the defendant, E. H. Bowman, for the sum of three thousand dollars, with interest thereon at the rate of ten per cent per annum from the twenty-sixth day of January, eighteen hundred and ninety-two, as damages sustained by the defendant's wrongful conversion to his own use and benefit of certain musical goods and instruments, known as the stock of the Durand Organ & Piano Company, upon which the plaintiff held a chattel mortgage executed by the said company, on the said twenty-sixth day of January, eighteen hundred and ninety-two. This mortgage was made to secure the payment of the company's note to the plaintiff, executed the same day, for the sum of three thousand dollars, with interest thereon at the rate of ten per cent per annum, payable upon demand, and was duly filed for record with the recorder of conveyances of Multnomah County, Oregon,

¹NOTE.—The circumstances that determine this case occurred in January, eighteen hundred and ninety-two, before the passage of the act of eighteen hundred and ninety-three (Laws, 1893, p. 30), and the case is decided under the old law. The same is also true of *Marks v. Miller*, 21 Or. 317; *Meyer v. Hess*, 23 Or. 599, and *Marquam v. Sengfelder*, 24 Or. 2.—REPORTER.

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on the day following its execution. The defendant admits the taking and appropriating of the said mortgaged goods to his own use and benefit on the twenty-ninth day of January, eighteen hundred and ninety-two, but denies that he did so wrongfully. He bases his right to so take and appropriate the said mortgaged goods upon four chattel mortgages thereon, executed to him by the said Durand Organ & Piano Company, to secure the payment of the sum of eighteen thousand nine hundred and thirty-eight dollars and seventy-five cents, and interest. Two of the said mortgages were executed and delivered to him on the ninth day of January, eighteen hundred and ninety-two, and were two days thereafter duly filed in Multnomah County, Oregon; and the other two were executed and delivered on the twenty-sixth day of January, eighteen hundred and ninety-two, and were filed for record on the following day. Among the articles so taken and appropriated by the defendant were twenty-six Durand organs of the value of eleven hundred dollars, which organs were not included in defendant's two mortgages of January ninth, eighteen hundred and ninety-two, but were described in his two mortgages of January twenty-sixth, and were also included in the plaintiff's mortgage of the same date, which was filed the following day.

After issues were joined, the case was referred to Richard H. Thornton, Esq., to take the evidence and report the facts and law therein. The referee, in his report, made eighteen findings of fact, and ten conclusions of law; and thereupon advised that judgment be given for the defendant. The plaintiff duly excepted to a portion of the report as made and filed by said referee, and moved that the same be set aside, and for judgment, alleging as reasons therefor that the findings and conclusions so excepted to are not supported by the evidence,

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and are contrary to the law. The defendant filed his motion asking the court to affirm the report as made and filed by the referee, and for judgment thereon. Upon the hearing of the motions for and against the confirmation of the referee's report, the court modified certain findings of fact and law therein, and gave judgment for the plaintiff for the amount agreed upon by the parties to be the value of those instruments in defendant's mortgage of January twenty-sixth, eighteen hundred and ninety-two, which were not included in his mortgage of January ninth, eighteen hundred and ninety-two, to wit: eleven hundred dollars.

The modification by the court of one of the referee's findings does not materially affect the case, but, as it is necessary to a proper understanding of the issues herein, it is copied as modified, viz.: "That on the twenty-seventh day of January, eighteen hundred and ninety-two, before the hour of eight A. M., the plaintiff and defendant, by their several agents, were present at the office of the recorder of conveyances for Multnomah County, and there presented for record the three mortgages executed as aforesaid on the previous day to plaintiff and defendant, and more particularly described in findings of fact number nine. The plaintiff's mortgage was presented to and received by the recording officer for filing one or two minutes before the defendant's mortgages were so presented and received. The presenting and receiving of the mortgages for recording was completed before eight o'clock A. M. of the said day, the hour at which the recorder is required by law to open his office." Among other conclusions of law, the referee found: "That the plaintiff's mortgage of January twenty-sixth, eighteen hundred and ninety-two, and the defendant's two mortgages of the same date, were, in contemplation of law, filed simultaneously, namely, on the twenty-seventh day

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of January, eighteen hundred and ninety-two"; that "where two chattel mortgages are filed simultaneously, the time of their execution must determine their priority"; and that as the defendant's "mortgages were all executed before that of plaintiff, he cannot be charged with a wrongful taking and conversion of any goods which are included in the mortgages of both parties." Hence, while the referee found that "in case of conflicting claims between mortgagees of chattels, he has the priority whose mortgage is first duly filed," as held in *Pittock v. Jordan*, 19 Or. 8, 13 Pac. 510, he considered the rule as there declared inapplicable to the case at bar, inasmuch as there was no priority in the filing of the mortgages. As a consequence of this view, the referee found that the defendant "did not wrongfully take or convert to his own use and benefit any of the chattels mentioned in the complaint." After the hearing upon the motion to set aside and confirm the report of the referee, the court re-referred the case for the purpose of obtaining a finding as to whether or not the plaintiff had notice, actual or constructive, of the existence of the mortgages of the defendant which were executed on the twenty-sixth day of January, eighteen hundred and ninety-two. The referee reported, as an additional finding of fact, that "the plaintiff had no actual or constructive notice of the actual existence of the two mortgages last named, or either of them, at the time of the execution of his mortgage." In view of this finding, taken in connection with the finding of fact as modified and above stated, the court found the law to be that "the time of the filing of said mortgages should date and be of the actual time at which they were received for recording by the recorder at his office, and should be filed as of that time," in lieu of the referee's finding that such mortgages in legal contemplation were filed simultane-

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ously. Hence the court held that the plaintiff's mortgage was filed before the defendant's two mortgages, and, within the rule laid down in *Pittock v. Jordan*, that it was entitled to priority over them without reference to the time of their execution. The court thereupon found that the defendant "did wrongfully take and convert to his own use and benefit the chattels mentioned in the complaint," and adjudged that the plaintiff recover as their value the sum specified as aforesaid.

REVERSED.

Messrs. Emmett B. Williams and William W. Thayer (*Messrs. Richard Williams and Chas. H. Carey on the brief*), for Appellant.

Mr. Rufus Mallory (*Messrs. Cyrus A. Dolph and Joseph Simon on the brief*), for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

Our inquiry in this case is whether, upon the facts as disclosed, the time of filing, or the time of executing, such mortgages should determine their priority. The solution of this inquiry depends upon our statutes. Prior to eighteen hundred and sixty-two our statute, like those of several other states, declared, in substance, that every mortgage of chattels thereafter made should be absolutely void, except as to the parties, unless the possession of the thing mortgaged be delivered to and be retained by the mortgagee, or unless the mortgage be filed as prescribed: Statutes, 1855, § 18, p. 528. In the revision of the statute for the purpose of framing a code of civil procedure, this section was repealed: Statutes of Oregon, p. 126. When the mortgages in question were executed and filed our statute provided that "It shall be the duty of the county clerk, upon the presentation for that pur-

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pose of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, and the payment of his fees, to endorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested": Hill's Code, § 3054. After such mortgage has been filed, the statute also provides that it "shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagors in good faith, after the expiration of one year from the filing of the same, or a copy thereof, unless within thirty days next preceding the expiration of the year the mortgagee, his agent or attorney, shall make and annex to the instrument, or copy, on file as aforesaid, an affidavit setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property therein mentioned, upon which affidavit the clerk shall indorse the time when the same was filed": Hill's Code, § 3056.

So far as these provisions are concerned, there is nothing in them to indicate that filing or failing to file a chattel mortgage, where there is no change of possession of the property mortgaged, raises or removes any presumption of fraud, disputable or conclusive, which affects the validity of such mortgage as against creditors, subsequent purchasers, or mortgagees in good faith. But subdivision 40 of section 766 provides that "every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for

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a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or assignment, that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law." As the sections which we have cited are *in pari materia* they must be construed together. The "mortgage duly filed or recorded as provided by law" in the last clause of subdivision 40, section 766, necessarily refers to section 3054, as there is no other section which provides for the filing of mortgages of personal property; and, as this section is silent regarding the effect of filing, or neglecting to file, a chattel mortgage, where the mortgagor retains possession, we must turn to said subdivision 40, to ascertain the nature of the legal consequences which result in such cases. Under this subdivision, a mortgage of personal property, unaccompanied by delivery and possession of the chattels mortgaged, raises a presumption of fraud, disputable but not conclusive, which may be overcome by showing that such mortgage was made in good faith and for a valuable consideration. Under the circumstances stated, the mortgage is valid as against third parties, when the *bona fides* of the transaction is made to appear. But the latter clause of the subdivision is to the effect that the fraud implied from the possession of the mortgagor does not exist when the mortgage is filed as provided by section 3054; the filing of the mortgage takes the place of the change of possession, or obviates its necessity. Such filing, like the transfer of the possession to the mortgagee, gives notice to third parties of his interest in the mortgaged property. It stands for a change of possession, and thus removes the presumption of fraud which would otherwise exist. By this means, a mortgagor is

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enabled to pledge his chattels as security, and retain the possession and use of them in a reasonable way, while the mortgagee is relieved from the burden of proving the *bona fides* of the transaction. The filing being a substitute for the mortgagee's possession, its object is to give notice to third parties, and to show the transaction to have been *bona fide*, and thus remove the presumption of fraud which would otherwise arise against it. As a consequence, if a mortgage of personal property is filed, although the mortgagor retains possession, the presumption of fraud does not exist; but if the mortgage has not been filed, a presumption of fraud arises, as against creditors and subsequent purchasers, which may be rebutted by making it appear that such mortgage was made in good faith. "The presumption raised by this subdivision," BOISE, J., said, "is as to unrecorded mortgages": *Orton v. Orton*, 7 Or. 482, 33 Am. Rep. 717. As to such mortgages,—not recorded or filed,—there is a presumption of fraud which, unexplained, renders them invalid, but which when explained, removes such presumption and leaves them intact and valid. Hence, a mortgage of chattels, unaccompanied by delivery and possession, although not filed, if made in good faith and for a valuable consideration, is not invalid as against creditors and subsequent purchasers.

The mortgage of the plaintiff was executed subsequent to, but on the same day as, the two mortgages of the defendant, but before they were filed. As the plaintiff had no actual notice of the existence of such mortgages, and the property remained in the possession of the mortgagor, in the absence of explanation, they were presumptively invalid as against the plaintiff. But if the defendant had succeeded in filing his mortgages before the execution of the plaintiff's mortgage, no such presumption would have arisen affecting their validity. The

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filing of the defendant's mortgages, after the plaintiff filed his, did not relieve them of the presumption of fraud which impugned their *bona fides*. Nor did the filing of the plaintiff's mortgage in any way affect their legal status in this regard. It was not the filing of the plaintiff's mortgage, but the failure of the defendant to file his before the execution of the plaintiff's mortgage, that fixed their status as presumptively fraudulent. The plaintiff filed his mortgage to protect it from the implication of fraud as against subsequent, and not prior, mortgages; hence his mortgage obtained no priority over the defendant's mortgages on account of being first filed. If the defendant should show, or it should be admitted, that his mortgages are *bona fide*, they are valid instruments, and as such created liens on the property in question from the date of their execution, which, being prior to the execution of the plaintiff's mortgage, gives them priority. The case is different where the statute declares in effect that no chattel mortgage shall be valid, except as to the parties, unless possession be delivered to and retained by the mortgagee, or unless the mortgage be filed or recorded as prescribed. Under this kind of statute, an unrecorded chattel mortgage, or one not filed, is absolutely void as against a subsequent mortgagee. "The statute," said MARSTON, J., "declares the instrument shall be absolutely void, and nothing short of a change of possession, or filing as the section requires, can save it": *Cooper v. Brock*, 41 Mich. 491, 2 N. W. 660. In other words, the statute declares that a prior unrecorded mortgage "shall be absolutely void as against" subsequent mortgages in good faith: *DeCoursey v. Collins*, 21 N. J. Eq. 360. If our statute was of this sort, the mortgages of the defendant, not having been filed when the mortgage of the plaintiff was executed, could not have priority, because they would be entirely void as against it. Such

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is not the legal consequence that follows want of possession or filing under our statute. Under it a chattel mortgage not filed, where the possession is retained by the mortgagor, in the absence of explanation showing the transaction to be fair and honest, would be considered fraudulent as against subsequent mortgagees. On the other hand, if such mortgage is shown, or admitted, to be founded on a valuable consideration, and made in good faith, it must be considered a valid instrument as against creditors, subsequent purchasers, or mortgagees.

Under the circumstances first stated, the mortgage of the plaintiff would be entitled to priority over the mortgages of the defendant, not because it was first filed, but because those of the defendant were not filed when his was executed, and therefore were to be regarded as presumptively fraudulent against it; while under those last stated, the mortgages of the defendant would be entitled to priority over that of the plaintiff, because, being valid instruments, they impressed a lien on the property from the date of their execution, which, being prior to the execution of the plaintiff's mortgage, conferred priority of right. As the case was brought and tried upon the theory that the priority of the mortgages in question was to be determined from the time of the filing, without regard to the time of their execution, the facts found, and the argument conceded, that the defendant's mortgages were *bona fide*, or valid instruments. Considered as such, the defendant acquired a lien on the property by his mortgages, which was prior to that acquired by the plaintiff's mortgage, and consequently he had a right to take the property covered by them, and, in so doing, did "not wrongfully take or convert to his own use the chattels mentioned in the complaint." In view of these considerations, the case of *Pittock v. Jordan*, 19 Or. 8, 18 Pac. 510, which holds that a chattel mortgage given

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in good faith is not valid as against a subsequent mortgage first filed, must be overruled. At common law the rule unquestionably was that where there was no change in the possession such transaction was void as to creditors. The rule of *Twyne's Case* and the other English cases following it, was that the retention of possession by the vendor or mortgagor rendered the transaction, as a matter of law, absolutely void; while in this country the courts are divided, some holding strictly to the English doctrine, and others holding such a transaction only presumptively fraudulent, subject to explanation, which should be considered by a jury with the other evidence in determining whether the title of the vendee or mortgagee was in fact affected by fraud: 2 Kent's Com. 516-531; *Marks v. Miller*, 21 Or. 317, 14 L. R. A. 190, 28 Pac. 17. The doctrine of our statute is founded on the principle of these latter decisions. As the case stands, in view of the considerations suggested, the judgment must be reversed, and the cause remanded for such further proceedings as may be proper and not inconsistent with this opinion.

REVERSED.

[Argued December 18, 1893; decided January 8, 1894.]

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29	200
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JAMESON v. COLDWELL.

[8. C. 35 Pac. Rep. 245.]

1. **TRIAL BY THE COURT—FINDINGS OF FACT ON MATERIAL ISSUES.**—The law is well settled in Oregon that in an action tried by the court without the intervention of a jury, findings must be made on all the material issues. *Drainage District v. Crow*, 20 Or. 535, and *Pengra v. Wheeler*, 24 Or. 532, cited and approved.
2. **CONTRACT BY CORPORATION THROUGH ITS OFFICERS—COMMISSIONS.**—Officers of a corporation acting on its behalf occupy a peculiarly confidential and fiduciary position, and must act solely for the best interests of the corporation, without reserving any secret advantage to themselves. A contract reserving a secret benefit to the officers is voidable by the corporation within a reasonable time after discovering the facts,

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and, having done so, the officers cannot recover any benefit or advantage that may have been promised them.

3. **PRINCIPAL AND AGENT—RATIFICATION OF CONTRACT—COMMISSIONS.**—Where a corporation has rescinded a contract made in its name by its officers because of a secret commission contracted for by such officers for themselves, the fact that the corporation again purchases the same property for the same price, less the secret commission, is not such a ratification of the original contract as to make the seller liable to the officers for their commission.
4. **RATIFICATION OF CONTRACT BY CLAIMING DAMAGES.**—Where an agent whose unauthorized contract of purchase has been repudiated by his principal sues the seller for the secret commissions promised him, the seller does not by setting up a counterclaim for damages ratify the contract so as to make him liable for the commissions.

APPEAL from Multnomah: HARTWELL HURLEY, Judge.

This action was brought by H. M. Jameson and A. F. Johns against Geo. L. Coldwell, to recover certain commissions alleged to be due for making a sale of a quantity of lumber for the defendant. The agreement for commissions was as follows:—

“This agreement, made the eleventh day of February, eighteen hundred and eighty-eight, between George L. Coldwell of Skamokawa, Washington Territory, of the first part, and H. M. Jameson and A. F. Johns of Los Angeles, state of California, the second part,—Witnesseth: That the said George L. Coldwell, in consideration of the services of the party of the second part, in making sale of four million feet of lumber, agrees to pay to the said parties of the second part, two and one half per cent on all moneys received in payment for said lumber and freight, and further agrees that he will pay said parties two and one half per cent on all future sales made to the parties purchasing said lumber, providing future sales are made on above basis. This percentage due and payable at Los Angeles, when said Coldwell is paid for said lumber and freight, or any part thereof. In witness whereof we have

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hereunto set our hands, the day and year above written.

"GEO. L. COLDWELL,

"H. M. JAMESON,

"A. F. JOHNS."

The sale relied on is evidenced by the following written agreement:—

"This agreement, made on the first day of March, eighteen hundred and eighty-eight, by and between Geo. L. Coldwell of Skamokawa, Washington Territory, of the first part, and the Western Lumber Company, a corporation doing business in the city of Los Angeles, state of California, party of the second part,—Witnesseth: The party of the first part agrees to sell and deliver to the said party of the second part, four cargoes of assorted lumber,—three million six hundred thousand feet, more or less,—to be delivered on the lighters at the port of San Pedro. The said lumber to be of Oregon pine and spruce, and of such size as may be ordered by said party of the second part, and as ordered by them, as near as the log will make. The party of the second part agrees to pay for said lumber the price as per schedule of the Pacific Pine Lumber Company of San Francisco, with seven and one half per cent added, the first cargo to be paid cash on delivery and the balance of the cargoes also in cash, at least the amounts of freight, and the balance in sixty days, in bankable paper. Lighters to be furnished by the said party of the second part at the ship.

"GEO. L. COLDWELL,

"A. L. JOHNS, President.

"H. M. JAMESON, Secretary.

"Witness: J. H. DARLING."

Afterwards this second agreement was modified by written indorsement thereon as follows:—

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"LOS ANGELES, April 9, 1888.

"The above contract is modified and amended to read as follows: The said party of the second part agrees to pay for said lumber the price as per schedule of the Pacific Pine Lumber Company of San Francisco, of January seventh, eighteen hundred and eighty-eight, and no per cent added. Otherwise to be as made.

"GEO. L. COLDWELL.

"Witness: A. NICHOLS."

On a trial before a jury the defendant had a verdict, and, judgment having been entered thereon, the case was brought here for review, and was reversed: 23 Or. 144. The amended complaint sets out the above agreements, and alleges that under the second agreement Coldwell sold and delivered about seventeen hundred thousand feet of lumber, and that he could and ought to have delivered the entire four million feet, but did not do so; and prays for the commission on the entire four million feet, amounting to twenty-three hundred dollars. The amended answer admits the delivery of the lumber, but claims that it was under the modification of the second agreement; denies that Coldwell was in fault in not delivering all the lumber that the contract called for; and then set up the following separate defense: "That the plaintiffs, in making the sale of lumber mentioned in the amended complaint were acting as the trustees and agents of the Western Lumber Company, and were the only persons representing said lumber company in negotiating and consummating the sale of said lumber. That the agreement set out in the amended complaint whereby plaintiffs were to receive a commission of two and one half per cent on the sale of said lumber to the Western Lumber Company, was made without the knowledge or consent of said Western Lumber Company, or

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any member thereof, except the plaintiffs. That the said Western Lumber Company never, at any time, consented to, or ratified, the said agreement made by plaintiffs, to obtain a commission on the sale of said lumber to said company. That immediately upon the discovery of the fact by the said Western Lumber Company that the plaintiffs were to receive a commission on the sale of said lumber to it, the said lumber company repudiated the contract made by plaintiffs for the purchase of said lumber, and refused to receive any lumber under said contract. That said written contract to pay the plaintiffs a commission of two and one half per cent on said sale of lumber to the Western Lumber Company, was made and secretly entered into by the plaintiffs while acting as the trustees and agents of the Western Lumber Company, for the purpose of defrauding said lumber company." The answer further set up two counterclaims for damages for being obliged to sell under the modified contract. The cause was tried, by consent of the parties, without a jury, and the findings of fact and conclusions of law being for the defendant upon all the issues, except his counterclaims, judgment was rendered for his costs and disbursements against the plaintiffs, from which they appeal.

AFFIRMED.

Mr. Edward B. Watson (*Mr. James Finley Watson* on the brief), for Appellants.

Mr. John T. McKee (*Messrs. Raleigh Stott, Whitney L. Boise, and Geo. C. Stout* on the brief), for Respondent.

Opinion by MR. JUSTICE MOORE.

The appellants requested the court to find and declare the facts upon the following issues: "1. Whether any negotiations were had between the Western Lumber

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Company, or any person claiming or assuming to act for or to represent it as an officer or agent thereof, in relation to the purchase of the lumber involved in this action, after its articles of incorporation were signed on March first, eighteen hundred and eighty-eight, and before the written agreement for said purchase between said company and said George L. Coldwell of the same date was executed. 2. Were the terms of such purchase, or any of them, as they appear in said written agreement, finally adjusted and agreed upon in the course of said negotiations? 3. Did Andrew Nicholls, as general manager of said company, act for or represent said company during said negotiations? 4. Did the plaintiffs, H. M. Jameson and A. F. Johns, or either of them, act for or represent, or assume to act for or represent, said company during said negotiations or any of them, as officers or agents of said company? 5. Did the plaintiffs, or either of them, take any part in making said purchase, or in arranging or agreeing upon its terms, as officers of said company, or otherwise, except to introduce said George L. Coldwell to said Andrew Nicholls, as general manager of said company, after its articles of incorporation were signed, until said agreement had been drawn up by said Andrew Nicholls, and they requested by him to execute the same in their official capacity on behalf of said company?" This request the appellants contend the court denied, and made no findings upon these issues, and this is assigned as error in the notice of appeal. Their theory is that Andrew Nicholls, the general manager of the corporation, negotiated the terms of the contract with the defendant, and the only part they took in the transaction was to introduce the defendant to him. A broker who merely brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive

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a compensation from both, though each was ignorant of his employment by the other: *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. Rep. 276; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Montross v. Eddy*, 94 Mich. 100, 34 Am. St. Rep. 323, 53 N. W. Rep. 916.

1. The pleadings present these issues, and the bill of exceptions shows that the plaintiffs testified that the general manager was directed to make this contract; that he drew it up, and they, at his request, signed it, but that they had nothing to do with the negotiations. It also shows, by the deposition of Andrew Nicholls, that the plaintiffs at that time were the only persons who represented the company. The law is well settled in this state that in an action tried by the court without the intervention of a jury, all the material issues must be passed upon: *Drainage District v. Crow*, 20 Or. 535, 26 Pac. Rep. 845; *Pengra v. Wheeler*, 24 Or. 532, 34 Pac. 354.

The findings of the court applicable to plaintiff's request are as follows: "2. That pretending to act as such officers of said company, and agents thereof, and for and on its behalf, they made and entered into the agreement set out in the answer filed herein, and on pages two and three of the amended complaint, with the defendant, on the first day of March, eighteen hundred and eighty-eight, by which the defendant agreed to sell and deliver to said company three million six hundred thousand feet, more or less, of Oregon pine and spruce lumber, to be delivered on the lighters at the port of San Pedro, California, and for which the said company agreed to pay the said Coldwell the price as per schedule of the Pacific Pine Lumber Company of San Francisco, California, with seven and one half per cent added." "10. That the articles of incorporation of the said Western Lumber Company were drawn up and signed by the incorporators thereof on the first day of March, eighteen

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hundred and eighty-eight, a few hours before the written agreement mentioned in the complaint." "11. That Andrew Nicholls, the general manager of said company, wrote out the contract between said company and the defendant, and had full knowledge of its terms, but neither said Nicholls nor the said company, except the plaintiffs as president and secretary thereof, had any knowledge of the agreement between the plaintiffs and defendant for the allowance of said commission to the plaintiffs for the sale of said lumber to said company."

2. These findings show that the contract was executed a few hours after said articles of incorporation were signed; that the plaintiffs assumed to act for and represent said corporation as officers and agents thereof in relation to the purchase of said lumber, and it must be presumed that the negotiations were not completed until the contract was executed, and that the terms of purchase as they appear in said written agreement were fully adjusted and agreed upon in the course of said negotiations, and hence it was necessary to find upon plaintiffs' first and second requests. The court finds that the plaintiffs, as president and secretary of said corporation, and agents thereof, and for and on its behalf, not only entered into, but made, the agreement with the defendant a few hours after the articles of incorporation were signed, and that at that time they represented the company, and it was their duty as such agents and trustees to promote its general welfare and protect its interests, and hence it was unnecessary to find upon plaintiffs' third and fourth requests.

If the plaintiffs as such agents made the contract with the defendant, they necessarily must have taken part in negotiating with him for the purchase of the lumber, and in agreeing upon the terms of payment, and therefore the court inferentially finds that the plaintiffs did

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more than merely introduce the defendant to the general manager, and this precludes the necessity of a finding upon the fifth request. The findings cover all the issues made by the pleadings, and show that the plaintiffs were not merely brokers who introduced the parties, but that they, as its officers and agents, took part in the negotiations, and made the contract, at the same time having a secret arrangement with the defendant for commissions. It is safe to presume that if the defendant could afford to sell the quantity of lumber he agreed to deliver and pay the plaintiffs a commission of two and one half per cent of all moneys received on account thereof, he could equally have afforded to remit that amount to the corporation. It was the duty of the plaintiffs to negotiate for the purchase of lumber for the corporation upon the best possible terms, and any advantage to be obtained in consequence of their efforts should inure to its benefit, and hence it follows that these commissions were, in equity and good morals, the property of the corporation. They could doubtless have been assigned to the plaintiffs by the corporation, or if it had, at the time the contract was executed, been aware of the agreement, and assented thereto, that would have amounted to a voluntary donation to them. The amended answer alleges that, aside from the president and secretary, the corporation at that time had no knowledge of the secret agreement between the plaintiffs and defendant for commissions, and the court so finds upon this issue. The plaintiffs then could have no moral right to a sum of money that was due the corporation, and as they were its agents and trustees, whose duty it was to advance its interests, and by their endeavors make the capital stock pay a dividend, they can have no legal right to these commissions. To permit the officers of a corporation to appropriate its property without rendering a just equivalent, is a fraud

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upon its creditors and stockholders, for whom the funds, property, and franchises are held in trust.

The case of *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385, is very similar to the one at bar. In that case the defendant was employed upon a salary to superintend the construction of buildings for his employers, who would pay no bills for labor or lumber until certified by defendant to be correct. The defendant entered into a secret agreement by which he was to receive a commission of two and one half per cent on lumber sold by plaintiffs to defendant's employers upon his recommendation. In an action to recover the commission, it was held that the contract was void. HENRY, J., said: "One employed by another to transact business for him has no right to enter into a contract with a third person, which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith toward his employer. The interests of the defendant's employers, and those of plaintiffs, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests." It was also held in the same case, that it was wholly immaterial whether the agreement with the defendant was ratified or not by the plaintiffs, and that the ratification of the contract would not have eliminated the element which rendered it invalid. It would doubtless be presumed that Andrew Nicholls, the general manager, who wrote the contract and was present when it was executed, represented the corporation, (*Sacalaris v. Eureka R. R. Co.* 18 Nev. 155, 1 Pac. Rep. 835, 51 Am. Rep. 737), but this presumption is overcome by the finding of the court that the plaintiffs made and entered into the contract with the defendant. The plaintiffs, as agents and trustees of the corporation, without its consent, could not make a

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contract on its behalf with the defendant, in which they had a private interest: *Morawetz, Private Corp.* § 517. They could not, therefore, with respect to these commissions, act for themselves and for the corporation, nor occupy a position in conflict with its interests: *Wardell v. R. R. Co.* 103 U. S. 651. Such a contract is not necessarily void *per se* in the sense that it is incapable of ratification, but it may be avoided by the corporation within a reasonable time: *Greenhood, Public Policy*, 296. This it did as soon as the secret agreement between the plaintiffs and defendant became known, and refused to accept any lumber from the defendant under the contract.

3. The appellants contend that the modification by which the seven and one half per cent above the said schedule price was remitted amounted to a ratification of the original contract, and made the defendant liable for their commissions. Ratification is the approval by the principal of the unauthorized act of an agent. If the agent carries out the instructions of the principal in the execution of a contract on his behalf, the minds of the principal and of the other contracting party have met and agreed upon the terms, and the contract is of binding force from the date of its execution. If, however, the agent make a contract for his principal without authority therefor, it cannot bind the latter because it is not his act, and the minds of the parties have never met or agreed upon the terms. If the principal ratify the act of the agent, the contract becomes valid, and in all things relates back to the date of its execution. There are certain acts on the part of the principal which are construed by the courts as a ratification. Thus, if he, with full knowledge of all the terms of a contract made by his agent, accept any portion of the fruits resulting therefrom, he is held to have accepted and ratified the whole: *Wharton, Agency*, § 72. The corporation did not accept any fruits of the

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transaction, but repudiated the whole contract within a reasonable time, as it had a right to do under the circumstances, and then made another for itself; and the fact that it adopted some of the language of the old contract, made it no less a new one. The defendant not having received or accepted any of the fruits of the old contract, and the seven and one half per cent above the said schedule price, which was the consideration for the agreement to pay the commissions, having been remitted by the new contract, there was no ratification of the old one nor any part thereof.

4. The appellants also contend that the defendant ratified the contract by his counterclaim for damages. Mr. Wharton, in his work on Agency, § 90, states the accepted law on that subject to be that if the principal elect to sue the agent for the proceeds, and not the damages caused by the unauthorized act, he necessarily ratifies the contract. When an agent, without authority, sells the property of his principal, the latter may waive the tort and bring an action for the proceeds, and, in doing so, he ratifies the act of the agent; but bringing an action against the agent for the damages caused by the unauthorized act can never amount to a ratification.

The contract at its inception having been unlawful because of the secret agreement, and not having been ratified, it follows that the judgment must be affirmed.

AFFIRMED.

Opinion of the court—LORD, C. J.

[Argued December 21, 1893; decided January 8, 1894.]

SAYRES v. ALLEN.

[8. C. 35 Pac. Rep. 264.]

95	211
128	7
95	211
30	331
25	211
36	200
36	552
25	211
39	841
25	211
45	259

CROSS-EXAMINATION—WITNESSES—CODE, § 837.—The right of cross-examination is a substantial and important one, and though its proper application rests primarily in the discretion of the trial court, that discretion will be reviewed in some cases. In practice a wide latitude should be allowed the adverse party in order that all the facts within the knowledge of the witness may be disclosed in their proper proportions and relations. Thus in an action to recover money alleged to have been collected by defendant as plaintiff's agent, where defendant alleges that he paid a designated amount to plaintiff through her husband, out of which plaintiff's claims should be satisfied, and the husband has testified in rebuttal that the money so paid was due him on account of a partnership existing between himself and defendant, and collections made by defendant as receiver and otherwise on accounts due him and another as partners, he may properly be cross-examined as to the nature and business of such partnership, and as to the collections and the receivership.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

Defendant appeals.

REVERSED.

Mr. Xenophon N. Steeves, for Appellant.

Mr. Roscoe R. Giltner, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

This is an action brought by Mrs. Maria Sayres against Wm. O. Allen to recover the sum of eight hundred and fifty-five dollars and eighty-five cents, alleged to have been collected by the defendant as her agent from a number of persons named in the complaint. The answer denies such indebtedness, and sets up counter-claims which the reply puts in issue. The trial resulted in a verdict and judgment for plaintiff for the sum of

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five hundred and ninety-nine dollars and thirty-five cents from which this appeal is brought. The error assigned relates to the refusal of the court to permit a witness to answer on cross-examination a certain question propounded to him. The bill of exceptions discloses that after the plaintiff rested her case the defendant was called as a witness in his own behalf, and, among other things, gave evidence tending to prove that he paid and advanced to the plaintiff through George Sayres, her husband and agent, twelve hundred and one dollars and seventy-five cents, that the amount claimed in her complaint should be satisfied out of this sum, and that he should have judgment for the balance. The defendant having rested his case, the plaintiff recalled George Sayres on her behalf as a witness in rebuttal, and, among other things, he gave testimony tending to prove that the said money so paid by the defendant was not paid on plaintiff's account, but that it was money due from the defendant to him on account of a partnership existing between himself and said defendant, and collections made by defendant as receiver and otherwise on accounts due said Sayres and one Antone as partners. Defendant, by his counsel, asked said witness, on cross-examination, to state "What partnership existed between said Sayres and defendant and between him and one Antone, when it was, its nature and business, and when defendant was receiver, and for what this money was collected by said Allen, and when, and fully state all about this partnership and receivership and moneys collected by Allen on account thereof"; to which question counsel for plaintiff then and there objected, whereupon the court sustained the objection, and refused to allow any testimony in regard to said partnership by the witness on said cross-examination, or as to the money collected as receiver, or as to the total amount of money which the said Sayres

Opinion of the court—LORD, C. J.

claimed the defendant had collected; to which ruling the defendant, by his counsel, then and there accepted, and said exception was allowed.

At the outset of the argument, the contention of the defendant involved the idea that the trial court, in its ruling, proceeded on the mistaken notion that the cross-examination of a witness is a matter within its discretion, and not a legal right of the defendant. We are satisfied however, that the trial court made its ruling from no misapprehension of its duties. It may be true, as claimed for the plaintiff, that the question asked was excluded because the matter to which it was addressed had been already freely investigated, but this cannot be assumed, it should be made to appear by the record. Certainly, if such was the case, it was the duty of counsel to have called the attention of the trial court to the matter, and secured its incorporation in the bill of exceptions certified to us, otherwise we cannot regard such matter. Judged by the record and the argument, the question asked was excluded upon the assumption that it was not proper cross-examination, or that it included matter beyond the scope of legitimate cross-examination. The extent and range of such examination is largely in the discretion of the trial court, and, as a consequence, its exercise is not subject to appellate review unless a clear case of abuse or manifest injustice is disclosed. The question, then, in the present case is, whether the ruling of the trial court amounted to an abuse of its discretion. It will aid us in the determination of this question to keep in view the object of a cross-examination, and the limit within which the right may be exercised. The object of all cross-examinations is to break the force, or destroy the effect, of the testimony given by the witness on his direct examination, or to lay the foundation for the testimony of other witnesses which shall have that

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effect. As a means to this end, when a witness has been examined in chief, the adverse party has the right to cross-examine him for the purpose of showing the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motives, his inclinations and prejudices, his means of obtaining a correct knowledge of the facts to which he has borne testimony, and the manner in which he has used these means, his power of discernment, memory, and description, so that the jury may have the opportunity of observing his demeanor, and of determining the just weight and value of his testimony: 1 Greenleaf on Evidence, § 446; Taylor on Evidence, § 1285; 1 Wharton on Evidence, § 545; Starky on Evidence, 195.

Such an examination affords one of the principal and most efficacious tests for the discovery of truth, and renders it extremely difficult for a witness subjected to such test to impose upon the court or jury. Such being its importance, great latitude should be allowed the adverse party in conducting his cross-examination, in order to make it effective and subserve the ends of justice. Our Code provides that "The adverse party may cross-examine the witness as to any matter stated on his direct examination, or connected therewith, and in so doing, may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rule as a direct examination: Hill's Code, § 837. Under this section the adverse party has the right to cross-examine the witness as to the facts and circumstances stated in his direct examination, or connected therewith, but if he wishes to examine him as to other matters, he must do so by making him his own witness, as such examination is to be subject to the same rules as a direct examination. Within the subject matter of the direct examination, a free range should be allowed in conducting such exam-

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ination. "It should not be limited," BEAN, J., said, "to the exact facts stated in the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination": *Doon v. Smith*, ante, p. 89, 34 Pac. Rep. 1093. A like view is expressed by BREWER, J., who says: "It may extend to other matters which limit, qualify, or explain the facts stated on the direct examination, or modify the inferences deducible therefrom, providing only that such matters are directly connected with the facts testified to in chief": *Blake v. Powell*, 26 Kan. 327. It is obvious, therefore, that a cross-examination is allowed a free range, if kept within the subject matter of the testimony given, especially as the cases show, where the person examined is a party or an unwilling witness. This being so, the right of cross-examination is a substantial right, which cannot be restricted so as to prevent the adverse party from going fully into all matters connected with the direct examination.

Within these limits, the defendant had a clear right to cross-examine Sayres, and requires him to give a detail of the facts and circumstances within the range of the subject matter of his direct examination, for the purpose of showing, if he could, the situation of the witness with respect to the parties, his motives, his interest, his prejudices, as well as means of obtaining correct information relative to the matters to which he had borne testimony. The record discloses that the defendant testified that he paid the money collected for the plaintiff to George Sayres, her husband, as her agent. The witness Sayres testified that he received the money from the defendant, but that it was paid to him as money due to himself on account of the partnerships and collections in

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regard to which he (Sayres) had testified in his direct examination. The material question was, how was this money paid? Was it, as the defendant testified, paid to Sayres as the agent of the plaintiff, his wife, and therefore to her; or was it, as Sayres testified, paid to him as money not due his wife, but moneys collected for himself from the sources named? As the solution of this question depended upon the effect which the jury would give the testimony, it was important, as the case stood, that the defendant should strengthen his own testimony and weaken Sayres' by all legitimate means. For this purpose he had a right to cross-examine Sayres fully in respect to all matters connected with his direct examination; he was entitled to put to him any question calculated to test his credibility, his memory, his motives, his interests, his prejudices, and the means and extent of his knowledge, or draw out any fact or circumstance which might tend to controvert, explain, modify, or weaken his statement in respect to the partnerships and receivership as the sources from which defendant collected the money and paid it as already indicated. Certainly, if it should have appeared on cross-examination that no such partnerships had existed at any time, and that the defendant Allen had never been receiver, then Sayres could not apply the money to his own use as claimed by him, and the defendant's testimony as to the application of such money would be materially strengthened. It does not matter how positive Sayres may have testified to the facts in his direct-examination; it does not preclude the adverse party, upon cross-examination, from requiring him to reaffirm or deny his previous statements, and to give a detail of the circumstances surrounding the facts to which he has testified, and tending to disprove their existence: *Phillips v. Elwell*, 14 Ohio St. 243, 84 Am. Dec. 373.

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"It was competent for appellant's counsel," said ELLIOTT, J., "to enter into the details of the subject matter opened up by the examination in chief, and they were not restricted to the statements made in general terms by the witness in his answers to the questions asked on direct examination. They had a right to demand, within reasonable limits, details and particulars, and were not to be put off with more general statements. A cross-examination is important, not only as a means of getting out in full detail all the facts within the range of the subject matter of the direct examination, but it is also an important means of testing the memory of the witness as well as a potent means of ascertaining the truth of his statements. It is very clear that the trial court erred in denying the appellant the right of asking the question submitted by her counsel": *Hyland v. Milner et al.* 99 Ind. 310. As a general rule, it is true that the range and extent of the cross-examination is within the discretion of the trial court, subject, however, to the limitation that it must relate to facts and circumstances connected with the matter stated in the direct examination. In such case, it is only when these limitations are disregarded that there has been an abuse of discretion which authorizes the appellate court to interfere. But the rule under consideration gives the right of inquiry on cross-examination into all the facts and circumstances connected with the matters of the direct examination. As the defendant had the right, on cross-examination, to require that Sayres should give a detail of the circumstances surrounding the facts to which he had testified, prejudice will be presumed where this right is denied. "The right of cross-examination being a substantial and very important right," says Judge SEYMOUR, "it is error to restrict it so as to prevent the cross-examining party from going fully into all matters connected with the examination in

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chief": 1 Thompson on Trials, § 406. As applied to the facts before us, we think the principle stated authorized the question objected to and excluded by the court. "Though we may not be able to see," said CHRISTIANCY, J., "that the answers could have benefited the defendants, or that they were actually injured by the rejection of these questions, yet, as they related to the same subject as the direct examination, and were therefore *prima facie* admissible, and we cannot affirmatively say, that they would not have elicited evidence material to the defense, nor, therefore, that the defendants were not injured by the rejection, in such trial, we must treat the rejection of these questions as erroneous": *O'Donnell v. Segar*, 25 Mich. 374. In view of the considerations suggested, the judgment must be reversed and a new trial ordered. **REVERSED.**

[Argued November 15, 1893; decided January 15, 1894.]

HOUGH v. HOUGH.

[S. C. 85 Pac. 249.]

PLEADING—ASSUMPSIT—DUPLICITY.—A complaint alleging that plaintiff on specified dates "loaned defendant money, furnished him goods, wares, and merchandise, and paid out money at his request" to a designated amount, and that defendant agreed and promised to pay plaintiff therefor,—states but one cause of action. It is not duplicitous, for it states only the facts connected with the one promise which is the basis of the action.

APPEAL from Crook: W. L. BRADSHAW, Judge.

This is an action to recover money. The complaint alleges, in substance, that the plaintiff, at the special instance and request of the defendant, between the dates specified, in Crook County, Oregon, "loaned the defendant money, furnished him goods, wares, and merchandise, paid out money at his request, etc., to the full aggregate

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amount of seven hundred and forty-eight dollars and fifty-eight cents"; that the "defendant agreed and promised to pay the plaintiff therefor the said sum of seven hundred and forty-eight dollars and fifty-eight cents,—that he has not paid the same or any part thereof, except the sum of four hundred dollars; and that there remains yet wholly unpaid a balance of three hundred and forty-eight dollars and fifty-eight cents, and that the same is now due," etc. The defendant interposed a motion to strike out the complaint, alleging as the ground therefor "that several causes of action are improperly united in one count," which motion was overruled, and, the defendant refusing to plead further, the court rendered judgment for the plaintiff for the amount claimed, from which judgment the defendant has brought this appeal.

AFFIRMED.

Mr. J. F. Moore, for Appellant.

Mr. Geo. W. Barnes, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

If the several facts alleged constitute but one cause of action, the complaint is not vulnerable to the objection raised by the motion; but if they are separate transactions or demands, they should be separately stated as distinct causes of action. A complaint which fails to keep separate the different grounds of action, but confuses and blends them in one statement, is open to the objection of duplicity. The vice of duplicity in pleading consists in the union of more than one cause of action in one count in a writ, or more than one defense in one plea, or more than a single breach in a replication; and not in the union of several facts, constituting together but one cause of action, or one defense, or one breach: *Jackson v. Rundlet*, 1 Woodb. & M. 381; *Harker v. Brink*,

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24 N. J. L. 333; *Patcher v. Sprague*, 2 Johns. 462. A complaint, therefore, may contain in a single statement numerous matters, provided they are covered by one contract, or constitute, when taken together, but a single cause of action. The complaint, in effect, states that the defendant, in consideration of the transaction alleged, promised to pay plaintiff the full sum specified, and that he had not paid the same, except a certain sum named, and that there is a balance now due and unpaid for which judgment is asked. The cause of action is based on the promise to pay for the goods furnished, money loaned and advanced, a specified sum, and the failure to keep such promise. The union of these several transactions is the foundation of the promise, hence they constitute together not several but one cause of action. The fact that each different transaction might be the ground of a distinct cause of action does not affect the principle involved when such transactions are united under one promise. "Where there is," said STRONG, J., "an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the parties": *Secor v. Sturgis*, 16 N. Y. 558. The complaint, it is admitted, is not well drawn, but we think it states a cause of action. If the defendant desired, he could have required an itemized account, or

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moved to have the complaint made more definite and certain, if this was essential to his defense, or necessary to more fully disclose the nature of the transactions. He did not see fit to pursue this course, but attacked it in its present form, embracing as it does all the items as an entire demand, or uniting the transactions under his promise and agreement to pay the sum specified as a single cause of action. Such being the case, we do not see how the ruling of the court affected any substantial right of the defendant. It results that the judgment must be affirmed.

AFFIRMED.

[Argued January 10; decided January 15, 1894.]

STATE v. CHAIME.

[S. C. 35 Pac. 450.]

ASSAULT WITH INTENT TO RAPE—INSTRUCTION—INVADING PROVINCE OF JURY.—On trial for assault with intent to rape, the court did not invade the province of the jury in charging that, "if the evidence establish the facts which usually accompany and precede the crime of rape when fully consummated, then if such facts and circumstances have not been explained, and the assault is made out, it is fair to presume that the assault was accompanied with the intent."

APPEAL from Multnomah: M. G. MUNLY, Judge.

Elias Chaims was indicted for assault with intent to commit a rape upon a female child under fourteen years of age. Nellie Bower, the prosecutrix, testified that defendant took improper liberties with her. Other witnesses testified to the place where defendant was seen with her; and defendant denied the charge as sworn to by prosecutrix, and offered testimony as to his good reputation. The only exception relied upon for reversal on appeal was to the following instruction by the trial court

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to the jury: "If you find that the alleged assault was made as charged, then has the intent been sufficiently proven. The intent must be established from the evidence, but it may be inferred from the facts and circumstances in evidence in this case. If the evidence establish the facts which usually accompany and precede the crime of rape when fully consummated, then, if such facts and circumstances have not been explained, and the assault is made out, it is fair to presume that the assault was accompanied with the intent." The defendant was convicted and appeals. **AFFIRMED.**

Mr. Henry E. McGinn (Messrs. Alfred F. Sears, Jr., and Nathan D. Simon on the brief), for Appellant.

Messrs. George E. Chamberlain, Attorney-General, and John H. Hall (Mr. Wilson T. Hume on the brief), for the State.

PER CURIAM.

The alleged error upon which the defendant relies for a reversal of the judgment is a certain instruction excepted to and set out in the bill of exceptions. This instruction is a transcript of an instruction approved in *State v. Newton*, 44 Iowa, 45, where the defendant was indicted and convicted of a like offense. Upon the facts as presented by this record, we think the instruction was applicable, and did not invade the province of the jury. Judgment affirmed. **AFFIRMED.**

Opinion of the court—BEAN, J.

[Argued November 6, 1893; decided January 15, 1894; rehearing denied.]

SLOAN v. WOODWARD.

[S. C. 35 Pac. Rep. 450.]

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This was a suit in equity brought by Ona Watson Sloan, personally and as administratrix of the estate of Andrew J. Watson, deceased, and F. R. Osborn, the guardian *ad litem* of Grace Watson, Alfred P. Watson, and Ona P. Watson, the minor children of said Andrew J. Watson, against John H. and Charles H. Woodward, with their wives, and the Portland Trust Company, to have John H. Woodward declared a trustee of certain lands. The matter having been referred to Wm. T. Muir, Esq., he reported that Woodward ought to be charged as trustee of part of the land. This report having been confirmed, both parties now appeal.

REVERSED AND DISMISSED.

Mr. Thos. N. Strong (*Mr. John T. Milner* on the brief),
for Plaintiff.

Messrs. Wm. M. Gregory and *John H. Woodward*, for
Defendants.

Opinion by MR. JUSTICE BEAN.

This is a suit to have the defendants declared to be trustees for plaintiffs of certain real property in Multnomah County, and arises out of the following facts: On June fourteenth, eighteen hundred and eighty-four, A. J. Watson was the owner of a promissory note for fifteen thousand dollars and sundry accounts against A. P. Ankeny, which were considered of doubtful value. On

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that day he assigned and transferred said note and accounts to the defendant John H. Woodward, who was then, and had been for some time, his attorney, and in consideration thereof Woodward gave him ten dollars in cash and the following promissory note:—

“\$15,490. For value received, on demand, after recovery from Alexander P. Ankeny, I promise to pay Andrew J. Watson, or order, fifteen thousand four hundred and ninety dollars, with interest after date at ten per cent per annum, out of the first moneys collected by me from Alexander P. Ankeny upon note and accounts this day indorsed and assigned to me by said Watson, after first paying costs and expenses of collection, including reasonable attorney’s fees.

“JOHN H. WOODWARD.

“Dated at Portland, June 14, 1884.”

Woodward immediately commenced an action against Ankeny on the note and accounts thus assigned, which on April twenty-fourth, eighteen hundred and eighty-six, resulted in a judgment in his favor for fifteen thousand six hundred dollars. In November, eighteen hundred and eighty-seven, Watson died, and the plaintiff, Ona Watson Sloan, was duly appointed as administratrix of his estate, and the firm of which the defendant Woodward is a member acted as her attorneys in the settlement thereof. On May eleventh, eighteen hundred and eighty-eight, Woodward caused to be sold, under an execution issued on his judgment, Ankeny’s interest in what is known in the record as the “Ankeny and Cadwell Tract of Land,” which at that time was supposed to be an undivided half of eighty-five and thirty-one hundredths acres, bidding it in himself for three thousand dollars, which amount was credited on the judgment. Prior to the sale under the Woodward judgment, the other undi-

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vided half had been sold under a decree of foreclosure against Ankeny in favor of Allen & Lewis, to which Woodward was a party, and bid in by Mr. Lewis for twelve hundred and ten dollars, but was subsequently redeemed by Woodward from his private funds and for his own benefit. As soon as he received the deed from the sheriff for the land purchased under his judgment,—also for that redeemed from Allen & Lewis,—he informed the administratrix of the Watson estate what had been done, and that the estate had no interest in the land redeemed from Allen & Lewis, but that he had made inquiry as to the value of the land purchased by him under his judgment, and was satisfied that fifty dollars an acre was an outside limit, and, on that basis, there was one thousand dollars coming to the estate, after deducting the costs and expenses of collection, and one thousand dollars for attorney fees, which he would pay over as soon as he could sell the land, or would deed to her so much thereof as would amount in value to one thousand dollars, and she could account to the estate for the money. To this last proposition she consented, and a deed for twenty-one acres was accordingly executed and delivered to her, she receipting as administratrix to Woodward for the one thousand dollars and charging herself therewith in her account as administratrix.

It is now contended, and this suit is brought by plaintiff upon the theory, that the transfer of the note and accounts to Woodward by Watson in eighteen hundred and eighty-four was for collection only, and that the judgment recovered thereon, and the land purchased thereunder, were and are held by him in trust for the estate; and this is the pivotal point in the case, for if it was an absolute sale and purchase, the judgment and land purchased thereunder belonged to Woodward, and he only became liable to the estate on his note for the

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value thereof less the costs and attorney fees, and, as a consequence, this suit must fail. If, however, he held the note and accounts for collection only, he acquired the land as trustee for the estate, and must account for it as such. The record is voluminous, but it seems to us there is no substantial controversy in the evidence upon this point. The transfer from Watson to Woodward was absolute in form, and Judge Woodward, whose testimony is frank and open, and who stands uncontradicted and unimpeached, testified that he purchased the note and accounts against Ankeny, amounting on their face to something over eighteen thousand dollars, for fifteen thousand five hundred dollars, of which he paid ten dollars in cash at the time, and gave the note set out for the remaining fifteen thousand four hundred and ninety dollars; that this transfer was intended and understood by both parties to be an absolute sale and transfer of the note and accounts, and that Watson was henceforth to look to Woodward, and not to Ankeny, for his money. The finding of the referee and court below was in accordance with this testimony, and indeed we are unable to see how any other finding could be sustained. It necessarily follows from this that if, as the court below seemed to think, Woodward has not paid over to the estate on his note the entire proceeds realized on his judgment against Ankeny, the remedy is by an action on the note, and not by a suit to have him declared a trustee of the land purchased and acquired by him under his judgment. This suit can be maintained only on the theory that, as alleged in the complaint, the transfer of the Ankeny note and accounts to Woodward, while in form absolute, was "meant and intended by all parties to be for collection only," and when this allegation fails, the suit is at an end, whatever the rights of the plaintiff might be in an action against Woodward on his note.

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It is proper to say, however, that this decision has no reference to the disputed title acquired by Woodward in what is known in the record as the "Cadwell Tract," because in his answer he disclaims title thereto and expresses a willingness, if its title is determined in his favor, to sell and dispose of the land and pay the proceeds over to the estate. From what has been said it necessarily follows that the decree of the court below must be reversed and the complaint dismissed.

REVERSED.

[Argued December 20, 1893; decided January 15, 1894.]

PATTERSON v. GALLAGHER.

[S. C. 35 Pac. Rep. 454.]

25	227
132	408

MECHANIC'S LIENS — FIXTURES.—Mechanics and material men are not entitled to liens for material or work unless the same has become part of the building or structure; no lien attaches for mere fixtures which are removable.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This suit was brought by S. Patterson and P. Gillam against W. K. Smith and Geo. Woodward, the owners of certain property, and Martin Gallagher, their tenant, to foreclose an alleged lien. In January, eighteen hundred and ninety-two, the defendant Gallagher leased of the defendants Smith and Woodward one of several apartments on the ground floor of a three-story brick building, belonging to them in Portland, for a saloon, and employed the plaintiffs, who are plumbers, to connect his bar with the waterpipes of the building and with the sewer, for which they charged the sum of ninety-seven dollars, and now seek to enforce it as a lien against the building. The matter was referred to Jarvis V. Beach,

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Esq., who advised the foreclosure of the lien, and it was so ordered by the circuit court.

REVERSED.

Mr. Joseph Simon (Messrs. Cyrus A. Dolph and Rufus Mallory on the brief), for Appellant.

Mr. Victor K. Strode (Mr. Chas. N. Wait on the brief), for Respondents.

PER CURIAM.

Several objections are made to the validity of the lien, but as we are of the opinion that the labor performed and material furnished do not entitle the plaintiff to a lien on the building under the mechanic's lien law, the other questions need not be considered. The statute confines the right to a lien to a person "performing labor upon or furnishing material to be used in the construction, alteration, or repair, either in whole or in part, of any building," etc.: Hill's Code, § 3669. Labor upon or material used in the construction, alteration, or repair of a building is the test of the right to a lien under this statute. "In other words," says FINCH, J., "the work and material, both in fact and intention, must have become a part and parcel of the building itself": *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674. The right to a lien proceeds upon the theory that the work and material for which the lien is sought has increased the value of the building by becoming a part thereof; and where such labor is performed or material furnished at the request of a tenant, in order to charge the property of the landlord, it must appear, therefore, in addition to the other requisites of section 3672, that such labor and material entered into and became a part of the building, and not merely a fixture for the mere convenience of the

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tenant: *McMahon v. Vickery*, 4 Mo. App. 225. Now, in this case it is clear the labor performed and material used by the plaintiffs did not become a part or parcel of the building, but were solely for the use and convenience of the tenant in conducting his business and removable by him whenever he might cease to be such. They were fixtures like the bar to which they were attached, and were not more permanently connected with the building. It follows that the judgment of the court below must be reversed and the complaint dismissed. **REVERSED.**

[Argued December 13, 1893; decided January 15, 1894; rehearing denied.]

OR. & CAL. R. R. CO. v. CITY OF PORTLAND.

[S. C. 22 L. R. A. 713; 35 Pac. 452.]

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1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—DISCRETION OF COUNCIL—INJUNCTION.—Where the measure of assessments for street improvements in a city is limited to the amount of benefits derived, and the common council is invested with a discretion in determining that amount, (East Portland Charter, [Laws 1885, pp. 316, 320], article VI., §§ 5, 18), the courts will not review the determination of the council, so long as its discretion is honestly exercised and not abused.
2. LOCAL IMPROVEMENTS—ASSESSMENT ON PROPERTY NOT BENEFITED—DUE PROCESS OF LAW.—The enforcement of an assessment for local improvements upon property not at all benefited thereby is the taking of property without due process of law.

APPEAL from Multnomah: MICHAEL G. MUNLY, Judge.

This is a suit originally brought by the Oregon & California Railroad Co. and the Southern Pacific Co. against the City of East Portland, its officers and employes, to restrain it and them from building elevated roadways on G and H Streets, adjoining plaintiffs' prop-

Argument of counsel.

erty, and to enjoin the collection of the assessment therefor. A temporary injunction was granted, restraining the construction of the roadways and the collection of the assessment, which was subsequently modified by permitting the defendants to build the roadways upon giving a sufficient bond, conditioned that said structures would be removed if it should be decreed that they were improperly built, or that the proceedings of the city council were insufficient to authorize their construction. After the consolidation of East Portland and Portland, the latter city was, by order of the court, substituted for the other defendants. The plaintiffs protested against the improvements when they were contemplated by the council, and, as soon as they were commenced, began this suit, but the defendants gave the required bond and proceeded with the work. The complaint sets out the alleged errors of the city council which it is claimed rendered its proceedings void, and, the defendants having denied all its material allegations, the cause was referred to H. H. Northup, Esq., to take the testimony and report his findings of fact and conclusions of law thereon. The referee, after taking the testimony, made among others the following findings of fact: "(2) The said improvements of G and H Streets are of no benefit to the property of the plaintiffs, described in finding of fact number six, in its present condition, nor are said improvements of any benefit to said property when used for the purposes for which it was purchased and intended, to wit: yard and depot purposes." The court, at the trial, approved said finding, and rendered a decree perpetually enjoining the collection of the assessment, from which the defendants appeal, and now contend that the assessment of benefits was a matter within the discretion of the city council, which the courts cannot review.

AFFIRMED.

Argument of counsel.

Messrs. Jarvis V. Beach, City Attorney, and *Henry E. McGinn* (*Messrs. Alfred F. Sears* and *Nathan D. Simon* on the brief), for Appellants.

The legislature has prescribed what is known as the frontage rule in making assessments to pay for the improvements of streets, granting to the council however the right to reduce the assessment if it determines that the abutting property would not be benefited in the full cost of making such improvement; the council not only did not determine that the abutting property would not be benefited in an amount equal to the cost of the improvement in front of it, but expressly determined and enacted in the ordinances providing for these improvements, which are in evidence in this case, that said property would be benefited in the full cost of making the improvement in front of it, so that both the legislature and the common council have passed upon the question, and their decision in the matter is conclusive, unless the physical condition of the property is such as to render it impossible for it to derive benefit from the improvement: *Paulson v. Portland*, 1 L. R. A. 673, 16 Or. 458; *Cooley, Taxation*, 661, *et seq.*; *Am. & Eng. Enc. Law*, p. 301, and cases there cited.

The finding of the referee on this point is to the effect that the improvement is of no benefit to the property as long as it is used for the purpose for which it was purchased, viz., making up trains, switching, and the like, but can an abutting owner relieve himself from an assessment of this kind by testifying that he purchased the property for a particular use, and that the improvement is no advantage to him or to the property so long as he makes such use of the property? A statement of such a proposition of law is enough to refute it: *Cooley, Taxation*, 663, 664; *Elliot, Roads and Streets*, 403, 441.

Argument of counsel.

The referee has found that these streets do not extend any farther west than Water Street, and the land west of these points being tide or overflowed lands. If there are no streets there, no property can be assessed for the improvement, but what right have plaintiffs to complain? If complainants owned the adjoining property they could not prevail in this suit upon the ground that there was no street laid out there, without tendering the amount of the assessment upon the remaining portion of their property: *Mills v. Charleton*, 26 Wis. 418, 9 Am. Rep. 578; *Evans v. Sharp*, 29 Wis. 564; *Evansville v. Pfisterer*, 34 Ind. 36, 7 Am. Rep. 214; *Meggett v. Eau Claire*, 81 Wis. 326; *Barker v. Omaha*, 16 Neb. 269; *Cook v. Racine*, 49 Wis. 244.

Mr. Albert H. Tanner (Messrs. *John H.* and *Hiram E. Mitchell* on the brief), for Respondents.

The power conferred upon municipal corporations to improve streets and assess the cost thereof upon adjacent property is a special and limited power, and can only be exercised by a strict observance of every requirement of the act conferring it: *Hawthorne v. East Portland*, 13 Or. 271; *Northern Pacific Terminal Co. v. Portland*, 14 Or. 27; *Strode v. Washer*, 17 Or. 53; *Van Sant v. Portland*, 6 Or. 395.

Under the provisions of the charter of the city of East Portland, property is only liable for the cost of the improvement, or any part thereof, when it is benefited by such improvement, to the extent of such assessment: Session Laws of 1885, article VI. §§ 5, 18, pp. 316, 320. The benefits to be conferred must be special benefits and advantages to the property in addition to those received by the community at large: *Chamberlain v. Cleveland*, 34 Ohio St. 551; *State v. Elizabeth*, 37 N. J. L.

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330; *Hammet v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Paulson v. Portland*, 1 L. R. A. 673, 16 Or. 450; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *State v. Jersey City*, 36 N. J. L. 56; *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *Philadelphia v. Philadelphia, W. & B. R. Co.* 33 Pa. 41; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *Dillon, Mun. Corp.* § 761; *St. Louis v. Allen*, 53 Mo. 44.

Where property is shown to be so situated with reference to the improvement that there cannot possibly be any actual or present benefit thereto, the finding and declaration of the council that the property is benefited is a legal fraud upon the property owner, which courts of equity will set aside as oppressive and in violation of the constitutional rights of such owner: *Paulson v. Portland* and *Chamberlain v. Cleveland*, *supra*; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Re Canal Street*, 11 Wend. 154; *State v. Jersey City*, *supra*; *Cooley, Taxation*, pp. 619, 641, 661, 662; *Soady v. Wilson*, 3 Ad. & El. 248; *Hanscom v. Omaha*, 11 Neb. 37; *Brown v. Denver*, 3 Colo. 169; *Johnson v. Milwaukee*, 40 Wis. 315; *Crawford v. People*, 82 Ill. 557; *Oreighton v. Manson*, 27 Cal. 614 at 625; *Zoeller v. Kellogg*, 4 Mo. App. 163; *People v. Brooklyn*, 23 Barb. 166; *Re New York Prot. Episcopal Public School*, 75 N. Y. 324; *Allen v. Drew*, 44 Vt. 174; *Louisville v. Louisville Roller Mill Co.* 3 Bush. 416, 96 Am. Dec. 243; *Elliott, Roads & Streets*, p. 410; *Mulligan v. Smith*, 59 Cal. 206; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun, 652.

Property acquired under legislative authority and held for railroad purposes exclusively, including road bed, right of way, depots, and station grounds, are held for public use, and are treated by law on grounds of public policy as an entire thing, not legally subject to coercive severance or dislocation, except by some act of

Argument of counsel.

the legislature expressly authorizing it. Hence such property is not subject to assessment for local improvements resulting in a specific lien upon specific parts or portions of such property, and the consequent sale thereof in the same manner as upon execution, as provided by the city charter of East Portland, unless expressly authorized by legislative enactment: *Applegate v. Ernst*, 3 Bush. 648, 96 Am. Dec. 272; *Graham v. Mount Sterling Coal Road Co.* 14 Bush. 425, 29 Am. Rep. 412; *Knapp v. St. Louis, K. C. & N. R. Co.* 74 Mo. 374; *Junction R. Co. v. Philadelphia & New York & N. H. R. Co. v. New Haven*, *supra*; *New York & H. R. Co. v. Morrisania Trustees*, *supra*; *Philadelphia v. Philadelphia, W. & B. R. Co.* 33 Pa. 41; *Ambercrombie v. Ely*, 60 Mo. 23; *Dunn v. North Missouri R. Co.* 24 Mo. 493; *Portland Lumbering & Mfg. Co. v. School Dist. No. 1*, 13 Or. 283; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Phillipps, Mechanics' Liens*, § 180; *Parke County Comrs. v. O'Connor*, 86 Ind. 536; *State v. Jersey City*, 36, N. J. L. 56; *Foster v. Fowler*, 60 Pa. 27; *Wilkinson v. Hoffman*, 61 Wis. 637; *Girard Point Storage Co. v. Southwark Foundry Co.* 105 Pa. 248; *Tylee Tap. R. Co. v. Driscoll*, 52 Tex. 13; *McPheeters v. Merrimac Bridge Co.* 28 Mo. 465; *Schulenburg v. Memphis, C. & N. W. R. Co.* 67 Mo. 442; *Skrainka v. Rohan*, 18 Mo. App. 340; *Dano v. Mississippi, O. & R. R. Co.* 27 Ark. 564; *Cox v. Western Pac. R. Co.* 44 Cal. 18; *Buncombe County Comrs. v. Tommey*, 115 U. S. 122, 29 L. Ed. 305; 2 Jones, Liens, §§ 1618, 1619.

Assessments made upon the property of the plaintiffs as to the benefits received, without notice and an opportunity to be heard upon that question, if deemed final and conclusive, would be unconstitutional as depriving them of property "without due process of law": *State v. Paterson*, 41 N. J. L. 83; *Mulligan v. Smith*, 59 Cal. 206; *Weimer v. Bunbury*, 30 Mich. 201; *Thomas v. Gain*, 35 Mich. 154, 24 Am. Rep. 535; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am.

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Rep. 289; Cooley, Taxation, p. 266; *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 145; *Seifert v. Brooks*, 34 Wis. 443; *Langford v. Ramsey County Comra.* 16 Minn. 375.

But if the matter of assessments of benefits is left subject to review by the courts, and the decision of the council is not deemed to be final and conclusive, then it is submitted that the property owner is not denied the right to be heard in reference to the assessment of such benefits, and the constitutional guaranty referred to is not violated: *Davidson v. New Orleans*, 96 U. S. 104, 24 L. Ed. 619; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. Ed. 569; *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. Rep. 385; *Gilmore v. Hentig*, 33 Kan. 156; Cooley, Taxation, 2d Ed. p. 636; *Wilson v. Salem*, 24 Or. 504; *Paulson v. Portland*, 149 U. S. 30, 37 L. Ed. 637.

Opinion by MR. JUSTICE MOORE.

The streets of the city having been dedicated by the proprietor to the public, the state, by its legislative assembly, may determine the necessity for, and character of, any improvement thereto, and what property will be benefited thereby; and whatever power the legislature possesses over the streets of a city it may delegate to corporate authorities to be exercised in the mode and to the extent prescribed in the act conferring such power. This delegation of power invests the municipal corporation with all the discretion the legislature possessed, and hence it follows that the common council, as agent of the corporation, is clothed with exclusive discretion in determining the necessity for, and character of, all street improvements, and what property will be benefited thereby, and the amount of benefits conferred. These are questions of policy with which the legislature and its

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creature, the municipal corporation, deals, and the courts have no right to interfere except in case of fraud or oppression, or some wrong constituting a plain abuse of such discretion: Elliott on Roads and Streets, 375; Cooley on Taxation, 661. It is impossible for a council to fix with mathematical accuracy the amount of benefits that will inure to property in consequence of a local improvement, but if it appear that it has exercised an honest discretion in determining this question of policy, however much it may have erred in judgment, the remedy is at the polls in choosing a new council, and not by reviewing its proceedings in the courts. If the courts were invested with authority to review these questions of policy, but few assessments could ever be collected without an action, and the adjudication of purely legislative questions would be substituted for the discretion of a city council. The only recognized exceptions to this rule are to be found in those cases in which, under pretense of apportionment, a work of general benefit has been treated as one of merely local consequence, and the cost imposed on some local community in disregard of the general rules which control legislation in matters of taxation: Cooley on Taxation, 450. The presumption is that the council has done its duty, but this presumption may be overcome by facts showing that the rule prescribed for the apportionment, or the assessment made under it, is so grossly and palpably unjust and oppressive as to give demonstration that the proper authority had never determined the case on the principle of taxation: Cooley on Taxation, 662; Elliott on Roads and Streets, 410.

1. Section 5, article VI., of the charter of East Portland (Session Laws, 1885, page 316,) under which the assessment was made, provides that "The council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or

part thereof liable therefor, its proportionate share of such cost, and if the council shall adjudge that any such lot or part of lot would not be benefited by the improvement in the full sum of the cost of making the same upon the half of the street abutting upon such lot or part of lot, the council shall assess upon such lot or part of lot, as its proportionate share thereof, such sum only as it shall find the lot to be benefited by such improvement." And section 18 of the same article provides that "Each lot or part thereof, within the limits of a proposed street improvement, shall be liable for the full cost of making the same upon the half of the street in front of and abutting upon it, and also a proportionate share of the cost of improving the intersection of two of the streets bounding the block in which said lot or part thereof is situated, unless the council shall have determined that such lot or part thereof will not be benefited by such improvement in the full sum of such cost, in which case such lot or part thereof shall be liable for so much of said cost only as the council shall have found the same to be benefited thereby; and the further cost of making said improvement in excess of the benefits so found shall be paid from the general fund of the city." These sections of the charter clearly provide that the measure of the assessment is limited to the amount of benefits derived, and invest the council with a discretion in determining that amount; and so long as this discretion is not abused, the courts are powerless to review its action in a collateral proceeding. THAYER, J., in speaking of the discretion of a common council in assessing benefits, said: "It exercises such authority as agent of the state, and for the public good; and so long as it keeps within the scope of its power the courts have no control over it, nor jurisdiction in a collateral proceeding to question its acts. If it were to assess property for the

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cost of constructing a sewer, so laid as to render it physically impossible to benefit the property, as in the case of *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739, it would exceed its authority, and it would be the duty of the courts to interfere, and prevent the wrong from working injury; but where the property is directly benefited by the prosecution of such an enterprise, and the common council has assessed what it deems a proportionate share of the cost upon the owner thereof, the courts are not authorized to institute an inquiry in order to ascertain whether or not the assessment exceeds the benefits": *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450. This is practically holding that if property had received any benefit from a local improvement, courts would not measure the amount, but if it were so situated that it could not possibly receive any benefit therefrom, they would interfere to prevent the wrong.

2. The referee who took the testimony found that the property was so situated that it had received no benefit from the improvement, and the court gave this finding its unqualified approval in the following expressive language: "The evidence shows that these elevated roadways led from Second Street to the river, where there is no wharf, warehouse, ferry, or landing, or other improvement; that it has not been traveled or used as a thoroughfare, or, in fact, for any purpose except for the storage of iron and materials; that there is no likelihood that it will ever be used as a traveled street; that it has not served any other cognate purpose; that it is an actual detriment to the property of the plaintiffs for the purpose for which it was purchased, to wit: yard and depot purposes. It appears also in the ninth and tenth findings of fact of the referee's report that the city built these elevated roadways beyond the west end of the streets over private property, ninety-five feet from the west end

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of G Street, and one hundred and thirty-nine feet from the west end of H Street, and attempted to assess the costs upon the plaintiff's property. The alleged improvements would appear to be a foolish and wholly uncalled for undertaking, which served neither the public nor the property holders in this instance; and the attempt to charge the property of the plaintiffs with the costs thereof is, to use the words of a famous jurist in a similar instance, 'so plainly, palpably, rankly, and ruinously unjust that it must be pronounced no proper or lawful mode of taxation, but an injustice so gross as to be void against the rights of property as protected by a bill of rights.'" The court and referee, from their knowledge of the premises, and of the character of the improvement, were well qualified to make these findings, which a careful examination of the record shows were fully warranted by the evidence. "The court," says Judge ELLIOTT, "will interfere with reluctance, and only in clear cases, but they will not abdicate all power of review and supervision. They will not substitute their judgment for that of the local officers, but they will not permit those officers to so abuse their discretion as to do great injustice to the citizen": Elliott on Roads and Streets, 411. "We have no doubt," said the court in *Allen v. Drew*, 44 Vt. 174, "that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." The court having found that there was no necessity for the improvement; that the elevated roadway as built had not been, and probably never would be, used; that the improvements were of no benefit but an actual damage to plaintiffs' property, and these conclusions being amply supported by

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the evidence, we feel bound thereby. The record shows that these roadways are from fifteen to thirty feet above the surface of plaintiffs' property, extending from Second Street on G and H Streets into the Willamette River, a distance of about three blocks, and can only be approached from Second Street; that they do not connect with any wharf, bridge, ferry, or landing, and, as the court substantially finds, stand out in the river as monuments of folly; that, though they have been built about two years in a populous city, teeming with life and business energy, they have only been used in a few instances by teamsters hauling away some iron pipes which had been landed thereon from the river. There could not have been much, if any, public necessity for these structures, if their actual use is to be taken as an indication of their utility. They have not been used by the public nor by the plaintiffs, and, as the court finds, probably never will be, and yet it is sought to collect the cost of their construction from the plaintiffs upon the theory of benefits concerned. Courts rightfully hesitate to review the discretion of a city council, and consider it a delicate question, and yet there are cases in which the exercise of the power of assessment becomes such a flagrant abuse that they must interfere to prevent the confiscation of property. In this case it clearly appears that the property of the plaintiffs was in no way benefited by the alleged improvement, and hence there was no foundation for the exercise of discretion on the part of the council in the assessment of such property for its cost, or any part thereof. Under such circumstances the enforcement of the assessment would be "taking property without due process of law," and the decree must therefore be affirmed.

AFFIRMED.

Points decided.

[Decided Jan. 9, 1894.]

STATE v. MOREY.

[R. C. 35 Pac. 656.]

1. **HOMICIDE—DELIBERATION AND PREMEDITATION.**—An instruction on a trial for murder, that the time occupied by defendant in going from one specified place to another was sufficient to afford him opportunity for deliberation and premeditation, is not erroneous, where the evidence shows that the defendant's mind was in its normal state, and that nothing had occurred prior to the killing to arouse his passion.
2. **MURDER—INSTRUCTION ON DELIBERATION AND PREMEDITATION.**—To constitute murder in the first degree, it is not necessary that the deliberate intent to kill should have been formed for any specific length of time prior to the commission of the act, but it is enough that it existed at the moment of the killing, provided that it was formed when the mind was in its normal state, under the control of the slayer, and not in the heat of passion; and ordinarily the question of whether there was deliberation will be left to the jury under all the circumstances of the case. Where, however, the conceded fact is that the defendant was not in any degree whatever excited or disturbed, and there was no question of cooling time in the case, the court may properly instruct the jury that the time required to walk from the street into the first story of a building was sufficient to afford opportunity for deliberation and premeditation.
3. **INSTRUCTIONS TO JURIES—ASSUMING EXISTENCE OF FACTS.**—Where there is any conflict in the evidence concerning the existence of any fact, the court ought not, in its instructions, to assume that such fact is or is not established; but when the uncontradicted evidence of the fact is clear and convincing, or when the fact is admitted, the court may properly assume that such fact is true, and frame the instructions accordingly.
4. **HOMICIDE—SELF-DEFENSE.**—The right of self-defense does not depend wholly upon the belief which the person claiming it entertained, but whether or not there was ground for a reasonable belief on his part that he was in danger of death or great bodily harm.
5. **HOMICIDE—CHARACTER OF DECEASED.**—If there is testimony tending to show that the defendant was assailed by the deceased, and was in apparent danger, the jury may consider that deceased was turbulent, violent, and desperate, in determining whether defendant had reasonable cause to apprehend great personal injury; but unless the defendant was, or believed himself to be, in imminent danger of death or great bodily harm, the bad character of the deceased is immaterial, since it is as great a crime to kill a bad man as a good one.

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6. **REASONABLE DOUBT.**—An instruction that “a reasonable doubt” is such a doubt as a juror can give a reason for is not reversible error, when given in connection with other instructions by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one.

APPEAL from Multnomah: M. G. MUNLEY, Judge.

George Morey having been convicted of murder in the first degree appeals. AFFIRMED.

Mr. Henry E. McGinn (Messrs. Alfred F. Sears, and Nathan D. Simon on the brief), for Appellant.

Messrs. Geo. E. Chamberlain, Attorney-General, and John H. Hall (Mr. Wilson T. Hume, District Attorney, on the brief), for the State.

Opinion by MR. JUSTICE BEAN.

The defendant was convicted in the circuit court of Multnomah County of the crime of murder in the first degree in killing one Gus Barry on the morning of the fifteenth of January, eighteen hundred and ninety-three, by shooting him with a pistol. The proof shows that previous to the homicide, the deceased, with his wife and Miss Wright, his sister-in-law, lived in a building in the city of Portland fronting upon and abutting Clay Street, containing three rooms, the one in front being occupied by the deceased and wife as a bedroom, immediately in the rear of which was the sitting-room, connecting with this room by double doors. In the rear of the sitting-room was another room, occupied by Miss Wright as a bedroom. The prisoner, who seems to have been a suitor of Miss Wright, was requested by her, two or three days before the homicide, at the suggestion of Mrs. Barry, to come and stay at the house nights, because the deceased

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was drinking, and it was feared he might assault and beat his wife, as he sometimes did when under the influence of liquor. On the night of the homicide the prisoner went to the house about half-past twelve or one o'clock in the morning, passing in from the street through an alleyway to the rear door, where he was admitted by Miss Wright, of whom he inquired if deceased was in, and, being answered in the negative, said, "I will see for myself." He then walked through the hall and across the sittingroom to the door of the bedroom of deceased and wife, who were both in bed, opened the door, and immediately thereafter the shooting occurred. It is disclosed from the defendant's own testimony that up to the time he entered the room of the deceased nothing had occurred to arouse his passion or disturb his mind in any way. There is some slight variance between the evidence for the state and the defense as to what occurred after the prisoner entered the room, but it is of no consequence on this appeal. The court instructed the jury fully upon the various aspects of the case, and in so doing defined particularly and with care the deliberation and premeditation necessary to constitute murder in the first degree.

A short time after the cause was submitted, the jury returned into court, and through their foreman asked the following question: "Would the time which elapsed while the defendant was going from the sidewalk into the room where the shooting took place be sufficient to give opportunity for deliberation and premeditation?" to which the court answered, "It would." This is the principal assignment of error relied upon for the reversal of the judgment. The contention for the defendant is that, while no particular time is necessary for deliberation and premeditation, it was an invasion by the court of the province of the jury to tell them, as a matter of law,

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under the facts of this particular case, that any fixed time would suffice for deliberation and premeditation on the part of the defendant. The argument is that while, as a conclusion of fact, the time occupied by the defendant in passing from the sidewalk to the room of the deceased may have afforded him sufficient time for deliberation and premeditation, although but a few moments elapsed, yet it cannot be so assumed as a matter of law, because its determination was peculiarly within the province of the jury under the evidence.

The crime of murder in the first degree is defined by the statute to be the killing of a human being "purposely and of deliberate and premeditated malice." To constitute this crime, it is essential that the deliberate and premeditated design to kill must precede the killing by some appreciable length of time, sufficient for reflection and consideration upon the matter, and the formation of a definite purpose to kill, and it matters not how short the time is if it is sufficient for that purpose. The rapidity of mental action is such that the formation of a design may not occupy more than a moment of time, and it is sufficient if it is formed and matured while the mind is in its normal state, and under the control of the slayer, however brief the space of time may be. In this case it affirmatively appears from all the evidence, both of the state and that of the prisoner himself, that during the time he was going from the sidewalk into the room of the deceased he was in possession of his usual faculties, and his mind was in its normal state, uninfluenced by passion or disturbed by any sudden and uncontrollable emotions, and under such circumstances we think it was not error to declare as a matter of law that the time occupied in so doing gave him opportunity for deliberation and premeditation, and this is all the court declares in its answer to the question propounded by the jury.

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The question did not call for, nor did the court by its answer intimate, any opinion as to whether there was deliberation and premeditation, but only that the time which elapsed after the defendant left the sidewalk was sufficient to give him as a sane man in a calm and deliberate state of mind, as the evidence shows him to have been, an opportunity sufficient for that purpose, leaving the question as to whether there was deliberation and premeditation for the jury to determine under the law as previously given them. Each of the other assignments of error have been carefully examined, but finding no error in the record we have no alternative but to affirm the judgment.

AFFIRMED.

ON REHEARING.

[96 Pac. 573.]

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2. Counsel for defendant not only insist that we are in error in the former opinion, but that there are other questions in the case, not heretofore called to our attention, which they now earnestly press as reversible error. Concerning the question presented at the former hearing, we think it necessary to add but little to what has already been said. To constitute murder in the first degree, it is not necessary that the deliberate intent to kill should have been formed for any specific length of time prior to the act, but it is enough that it exists at the moment of the killing, if it was formed when the mind was in its normal state, under the control of the slayer, and not in the heat of passion. It is therefore clear that the killing of a human being in pursuance of a deliberate and premeditated design, formed during the space of time necessary to walk the distance mentioned in the question propounded by the jury, would be murder in the first

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degree, and hence there was an opportunity afforded for such premeditation, if the mind of the slayer was in a condition to deliberate and premeditate. As the power to deliberate or premeditate is possessed only by those having a mind free from passion or excitement, it cannot be said, as a matter of law, that any given space of time would afford an opportunity to a given person for deliberation and premeditation, if there is any question as to whether his mind was so disqualified or disturbed. In such case the question as to whether there had been sufficient cooling time, and whether the mind was in a condition to deliberate and premeditate, would be for the jury to determine, and not the court. Hence, the answer of the court in this case, given to the question propounded by the jury, that the time occupied by the defendant in going from the sidewalk to the place of killing afforded him opportunity for deliberation and premeditation, would without doubt have been error, if there had been any evidence in the case showing, or tending to show, that his mind was not in its normal state, but disturbed or disqualified by passion or excitement, or had there been any question as to the sufficiency of a cooling time. But the conceded facts, as they appear in the record, show that defendant's mind was in its normal state, and not in any way disqualified by passion or excitement, and that nothing had occurred prior to the killing to arouse his passion or disturb his mind, and therefore there was no question of cooling time in the case, and the court had a right to assume, in instructing the jury, that his mind was in a condition to deliberate and premeditate.

3. It is settled law that when there is any conflict in the evidence as to the existence of any fact, the court cannot, in charging the jury, assume that such fact is or is not established, but when the evidence is clear and convincing upon the question, and there is no evidence to

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the contrary, an instruction assuming it as true will not work a reversal of the judgment: Thompson, Charging the Jury, 74; *Koerner v. State*, 98 Ind. 7; *Hanrahan v. People*, 91 Ill. 142. Now, in this case, the entire evidence given on the trial is made a part of the record, and a careful inspection of it fails to disclose any conflict as to what occurred on the night of the homicide, up to the time defendant entered the room where the killing took place, nor is there anything therein from which even an inference can be drawn that defendant was in a disturbed or excited state of mind or in any way disqualified from coolly and deliberately considering and reflecting upon the contemplated act. This being so, the court had a right, in answering the question of the jury, to assume that defendant's mind was in the condition which the evidence shows it to have been, and upon such conceded facts it committed no error when it declared that he had an opportunity to deliberate and premeditate during the time he was walking from the sidewalk to the place where the killing occurred. If, as was intimated at the argument, it is probable the jury were prompted to ask the question because they imagined some conversation took place between the defendant and Miss Wright when she admitted him into the house, which aroused his passion, and caused him at that time to form the design to do the killing, it was a supposition wholly unwarranted by the evidence, and a mere matter of speculation outside of the record, and for which we can afford no relief. Miss Wright, Mrs. Barry, and the defendant, the only witnesses who testified on this subject, all agree that when the defendant entered the door he simply inquired of Miss Wright if Barry was in, and, being answered in the negative, said "I'll see for myself." In this there is nothing which could in any way tend to arouse the passion or disturb the mind of the defendant, and as the correctness of the

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ruling of the court must be determined from the record alone, and as we can only reverse a case for error appearing affirmatively therein, we are all agreed that there is nothing in this question to warrant a reversal of the judgment.

4. Passing now to the other questions presented, it appears that there was some evidence which, in the opinion of the trial court, made it necessary to instruct the jury upon the law of self-defense, upon which the defendant requested the following instruction: "If you believe that the defendant was assaulted in such a way as to give him ground as a reasonably prudent man (making all due allowance for his condition at the time and for his mental and intellectual state and degree of intelligence,) in the condition in which the assault placed him, to apprehend a design on the part of the deceased to kill him, or to do him some great bodily harm, he would have the right instantly to defend himself, and, if necessary, to kill the deceased in such case; if you find such to be the facts you must find the defendant not guilty." And also: "The right of self-defense may be exercised if the danger which the defendant seeks to avert is apparently imminent, irremediable, and actual. The question of apparent necessity can only be determined from the defendant's standpoint, not that of the jury, not that of the court, but from the standpoint of the defendant himself. The defendant must be acquitted (of malicious homicide); that is, he can be convicted of no offense greater than manslaughter, if even of that, if he only defended himself to the extent to which, according to his honest convictions as affected by his particular individuality, defense under the circumstances appeared to be necessary." These instructions were refused by the court, except in so far as the principles therein embodied may have been given in the general charge, which was as follows: "The killing of a human being is justifiable

when committed by any person to prevent death or any great bodily injury being committed upon him. Homicide can be excused or justified on the ground of necessity alone. The necessity must be apparent, actual, imminent, absolute, and unavoidable, or the defendant must, from all the circumstances, have honestly believed it to be so. To excuse homicide the party must act under an honest and well founded belief that it is necessary to take life to prevent great bodily harm. It must be danger so urgent that the killing is absolutely or apparently necessary; and the danger must not have been brought on by the slayer. Imminent and apparent danger, means such overt actual demonstrations as would make the killing apparently necessary to his preservation from death or great bodily injury. The danger must be unavoidable according to the facts and circumstances as they honestly appeared at the time to the accused; but it is not necessary that the danger should in fact have existed at the time, if the defendant had reason to believe and did believe that it existed. Actual and real danger to the defendant's comprehension as a reasonable man, as it then appeared to him in good faith, is sufficient. That is to say, a person may safely act in good faith on appearances. His guilt must depend on the circumstances as they appeared to him at the time. But the apprehension must be on good ground, sufficient to reasonably satisfy the mind from appearances that death or great bodily harm was about to be inflicted upon him. If, under all the circumstances, he had reasonable grounds for apprehension, the killing would be justifiable, even though the appearances were false, and there was no design on the part of the deceased to take life or to do great bodily harm. But whether or not there was such reasonable appearance of danger, and whether or not the defendant honestly and in good faith acted upon it, and under the circumstances

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had reason to believe that he was in imminent danger of death or great bodily harm, is a question for the jury to determine from all the facts and evidence in the case."

The contention of defendant's counsel, and the principle embodied in the instructions refused, as well as those given, to which the exception is directed, as we understand it, is that the real or apparent danger, sufficient to justify the taking of human life, is to be determined from the defendant's standpoint alone, and that if he honestly believed his life in danger, or that he was in danger of great bodily harm, and, acting under such belief, took the life of his supposed assailant, it would be excusable homicide. This theory bases the right of self-defense upon the belief of the person defending, and not upon the ground of such belief or the reasonable appearance of danger. We do not so understand the law. A recent writer on this subject has thus concisely stated the rule as supported by the great weight of authority: "In order to justify a homicide on the ground that it was committed in self-defense, it must appear that the defendant, at the time he caused the death of the deceased, was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that it was necessary for him to strike the fatal blow or to perform such other act causing the death of deceased, in order to avoid the death or great bodily harm which was apparently imminent": Kerr on Homicide, § 166, and authorities there cited. Under this rule and the authorities cited in its support the justification of a homicide on the ground of self-defense is not a question which depends wholly upon the belief which the defendant entertained, but the question is what was his belief, and whether, under all the circumstances, as they appeared to him at the time of the homicide, the jury think there was ground for a reasonable belief in his mind

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that he was in danger of death or great bodily harm Mr. Wharton advocates the doctrine that the question of apparent necessity is to be determined from the defendant's standpoint, but he says that it is only a non-negligent belief in danger which will be an excuse for a homicide committed under such fear: 1 Wharton, *Crim. Law*, 9th Ed. 490; 14 *Central Law Journal*, 263. If this is anything more than stating in another form that it must be a reasonable belief, we prefer to follow the path as marked out by the great weight of authority. A man, though in no apparent danger, might kill another through fear, alarm, or cowardice, under the belief, honestly entertained, that great bodily harm is about to be inflicted upon him, and certainly it could not be claimed that under such circumstances he would be justified in so doing, because the belief would be an unreasonable one and not justified by the circumstances in which he was placed. The right of self-defense is founded on the law of necessity, and can only be exercised when the slayer is acting under a reasonable belief, arising from the circumstances of the case as they appear to him, that his life is in imminent danger or that he is in danger of great bodily harm from some overt act of his assailant, and that it is necessary for him to take life to protect his own. The reasonableness of the defendant's belief was to be determined from his standpoint, but it was a question for the jury, as to whether he had sufficient grounds upon which to base such belief. As we understand it, the charge of the court above quoted is in conformity to this principle, and was, therefore, free from objection. By the expression, "actual or real danger to the defendant's comprehension as a reasonable man," as used in the charge, which is the only portion objected to, the court did not, as counsel seems to claim, lay down the rule that defendant's conduct was to be judged by the

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standard of an "ideal reasonable man," but only that he must have acted under a reasonable belief in apparent danger, justified by the circumstances of the case. This is obvious from the remainder of the instruction, especially from what immediately follows, which is explanatory thereof. We conclude, therefore, that there was no error in refusing the instruction asked, or in that given by the court.

5. The next assignment of error is in instructing the jury as follows: "When a homicide is committed under circumstances that it was doubtful whether the act was committed maliciously or from well-grounded apprehension of danger, it is proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate in determining whether the accused had reasonable cause to apprehend great personal injury to himself, but the circumstances of the case must at least raise a doubt in regard to the question whether the prisoner acted in self-defense." It is claimed that the error of this instruction consists in prohibiting the jury from considering the evidence tending to show the turbulent, violent, and desperate character of the deceased unless they were in doubt whether the accused acted maliciously or from well-grounded apprehension of danger, and it is insisted that if the jury were in doubt upon either of these points it was their duty to acquit, and evidence of deceased's character was consequently superfluous. This is but a part of the instruction of the court upon that question, and while this manner of taking and saving an exception is to be commended, because it calls the attention of the trial court to the specific portion of the charge to which an objection is made, yet, in considering the question presented, on appeal, we must examine it in connection with the remainder of the instruction, which was as follows: "It is no excuse for murder that the

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person murdered was a bad man, because in the eyes of the law it is as great an offense to kill a bad man as a good man, to kill a quarrelsome and brutal man as it is to kill a mild and inoffensive man. And unless the circumstances show that the defendant acted in self-defense, or was in imminent danger, or believed himself to be in danger, of death or grievous bodily harm, the bad character of the deceased will not avail him." As thus considered, the rule announced by the court was, in substance, that if the jury were in doubt from the circumstances of the case, independent of the deceased's character, as to whether the defendant acted maliciously or from well-grounded apprehensions of danger,—that is, acted in self-defense,—it was proper for them to consider the evidence tending to show the violent and desperate character of the deceased in determining the question, but such evidence would not avail him unless they had some doubt upon this question, for it is as much a crime in the eyes of the law to kill a quarrelsome and brutal man as a mild and inoffensive one. In other words, if the jury believed that at the time of the homicide there was some overt act on the part of the deceased indicating an intention to assault the defendant, but were in doubt or were hesitating as to whether such threatened assault gave him reasonable grounds to apprehend death or great bodily harm from the deceased, it was competent and proper to consider the evidence of deceased's bad character in determining whether defendant acted under a reasonable apprehension of imminent peril, or maliciously, and this seems to be the rule of law upon this question: Wharton, Crim. Ev. § 69, *et seq.*

In *State v. Keene*, 50 Mo. 360, from which a portion of the instruction objected to was evidently taken, Mr. Justice WAGNER says: "When the homicide is committed under such circumstances that it is doubtful whether the

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act was committed maliciously, or from a well-grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself." And in *People v. Murray*, 10 Cal. 310, from which the remainder was taken, it is said: "The rule is well settled that the reputation of the deceased cannot be given in evidence, unless at the least the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal." In *State v. Bryant*, 55 Mo. 78, in considering this question, Mr. Justice WAGNER further says: "Whilst it is perfectly true that the character of the deceased affords no justification, and will not even palliate the crime, where it appears that the defendant was the aggressor, and provoked the altercation, still it frequently becomes of great importance in determining the degree and quality of the offense. A bad man, as well as a good one, is equally under the protection of the law, but in a case of homicide, where it is doubtful whether it was committed with malice or from a well-grounded apprehension of danger, it is necessary to take into consideration the fact that the deceased was desperate, violent, or dangerous. A peaceable, well-disposed man, although in anger, might excite very little fear, whilst the menacing attitude of a cruel, vindictive, and desperate person would cause the greatest apprehension, and justify a line of action in the one case which would be wholly unwarrantable in the other."

The theory upon which evidence of this nature is

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admissible in cases of homicide, is that when the plea of self-defense is interposed, a danger which is apparently imminent is to be considered and treated as if it were actual, real, and imminent, and such apparent danger must necessarily appear more menacing when regarded with reference to the assailant's character for violence and brutality as well as his special animus to the accused. When, therefore, the evidence tends to show that the defendant acted under an honest apprehension of danger from some overt act of the deceased, he may put in evidence the ferocity, brutality, or vindictiveness of his assailant as tending to show that he had reasonable ground for such belief, and when the acts or intentions of the deceased in reference to the fatal encounter are equivocal or doubtful, such evidence becomes very important and material. But before it can be introduced, or considered by a jury, the testimony must at least tend to show that the defendant was assailed by the deceased, and in apparent danger, for the character of the deceased, however bad, will not of itself justify or even palliate the crime. We think there was no error in giving the instruction complained of, and that the court did not, as claimed by counsel, prohibit the jury from considering the evidence of deceased's character, unless they were in doubt as to his guilt or innocence, but in effect the instruction was, that if the jury were in doubt as to whether the killing was malicious or from well-grounded apprehension of danger, it was proper to consider such testimony as tending to show that his act was not malicious, but founded on a reasonable belief in imminent peril.

6. It is also urged that the court erred in defining a reasonable doubt. The definition was as follows: "A reasonable doubt, gentlemen, is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the mind of the jury in that con-

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dition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. A reasonable doubt is not every doubt; it is not a captious doubt: it is such a condition of mind, resulting from the consideration of the evidence before you, as makes it impossible for you, as a reasonable man, to arrive at a satisfactory conclusion. It is not a consciousness that the conclusion arrived at may possibly be erroneous, but it is such a state of mind as deprives you of the ability to reach a satisfactory conclusion. A reasonable doubt is a doubt which has some reason for its basis; it does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for." The exception and argument are aimed only at that portion of the charge in which the court told the jury that "A reasonable doubt is such a doubt as a juror can give a reason for." Almost innumerable efforts have been made by the courts to define the expression "reasonable doubt," as used in the criminal law, but so far none of them have met with universal approval, or been remarkable for accuracy of expression or clearness of thought, and in many jurisdictions the courts have declined to enter into any explanation of what the term means, because it is believed the term itself is as well calculated to convey to the mind of the juror its own meaning as any definition which can be given, and that to try to give a specific meaning to the word reasonable is, as Mr. Stephen says, "trying to count what is not number, and to measure what is not space": Common Law, 262; *Miles v. U. S.* 103 U. S. 304. In this state, however, the practice prevails, in instructing juries in criminal cases, for the courts to attempt to define the term, and the familiar definition of Chief Justice SHAW in the celebrated Webster case is generally adopted. This definition, although it has been

criticised as not being strictly accurate, is perhaps more generally recognized as a correct and concise explanation of the term than any other to be found in the books, and, having been approved by this court (*State v. Glass*, 5 Or. 73; *State v. Roberts*, 15 Or. 196, 13 Pac. 896), trial courts should adopt it, rather than struggle for originality where precedent alone should govern. It is always safer to follow the plainly marked path than to venture on byways strewn with the wrecks of those who have unsuccessfully attempted to follow them, and this is particularly true when attempting to define a reasonable doubt.

The utmost confusion exists in the adjudged cases in this matter of definition, and instances abound in the books where the same definition has been held error in one jurisdiction and as correct in another, and this is even true in the same state. But the authorities all agree that a doubt, to be reasonable, must be actual and substantial, as contradistinguished from a mere vague and imaginary one, but they differ widely as to what is an accurate expression of the definition of such a doubt. This difference naturally grows out of the inadequacy of language to make plainer, by further definition or refining, a term the meaning of which is within the comprehension of every person capable of understanding common English. It would undoubtedly have been better and safer for the trial court in this case to have omitted from its definition that portion of the instruction to which the objection was directed, but, since it was given, we must decide whether it contained error prejudicial to the defendant. In *Cowan v. State*, 22 Neb. 519, 35 N. W. 405, and *Carr v. State*, 23 Neb. 749, 37 N. W. 630, it was held that an instruction defining a reasonable doubt as "a doubt for having which the jury can give a reason based upon the testimony," was reversible error, because it was calculated to and did mislead and confuse

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the jury, but just how is not stated, unless, as can be inferred from the doctrine of the case of *Brown v. State*, 105 Ind. 385, 5 N. E. 500, cited in the opinion in *Carr v. State*, it was because the court limited the doubt to one arising from the evidence alone, (which is not so limited in the case at bar,) and which in the case referred to was criticised because such a doubt might arise from the want of evidence as well as from the evidence in the case, although it was held not reversible error. These Nebraska cases are the only ones to which our attention has been called or which we have been able to find in which such an instruction has been held error, except one from Alabama,—*State v. Ray*, 50 Ala. 104,—which is in direct conflict with the succeeding case reported in the same volume. In *Morgan v. State*, 48 Ohio St. 371, 27 N. E. 710, and in *State v. Sauer*, 38 Minn. 438, 38 N. W. 355, instructions substantially the same were criticised because they did not define, but themselves required definition, which might truthfully be said of any definition of a reasonable doubt heretofore given. But the objection did not in either case seem to impress the court as of any great importance.

In *People v. Stoubenvoll*, 62 Mich. 329, 28 N. W. 883, it seems to be conceded that the instruction that "what is meant by a reasonable doubt is, as the term implies, a doubt arising out of the facts and circumstances of the case, in maintaining which you can give a good reason," was not strictly accurate, but the court said it could have produced no practical consequences in the case, and refused to reverse on that ground. In 14 Central Law Journal, 447, it is said that a reasonable doubt "must be such that a jury can give a reason for," and Judge SPEER, in instructing the jury in the case of *U. S. v. Jackson*, 29 Fed. R. 503, and in *U. S. v. Jones*, 31 Fed. R. 718, says that "it is a doubt for which a good reason can

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be given, which reason must be based on the evidence or want of evidence." So also in *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493, which was an appeal from a conviction of murder in the first degree, the court held, that an instruction that a reasonable doubt was one "for which some good reason arising from the evidence can be given" was not error, and affirmed the judgment. In the course of the opinion Mr. Justice DANFORTH says that it has not been too strongly stated that all the authorities agree that "an undefinable doubt which cannot be stated, with the reason upon which it rests so that it may be examined and discussed, can hardly be considered a reasonable doubt, as such an one would render administration of justice impracticable": 3 Greenleaf, Ev. § 29, note, 14th Ed. And this, it seems to us, is in substance what the court said in the language complained of when read with the whole instruction of which it forms a part, and when so read it was evidently the result of a struggle by the court to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The particular language in question may be, and no doubt is, subject to the criticism that it does not define, but needs defining, but we do not think it could have misled or perplexed the jury when considered in connection with the remainder of the instruction. If every criminal case is to be reversed for some technical inaccuracy in the definition of a reasonable doubt, then indeed the "administration of justice becomes impracticable." Fully realizing the consequences of this decision, we have given the question presented the utmost care, and, finding no error in the record, have no alternative but to adhere to our former opinion.

AFFIRMED.

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[Argued October 30, 1898; decided January 8, 1894.]

OSMUN v. WINTERS.

[S. C. 35 Pac. Rep. 250.]

1. BREACH OF PROMISE—SEDUCTION AS AN ELEMENT OF DAMAGES—CODE, § 38.—In actions for breach of promise, seduction under the promise may be shown in aggravation of damages, notwithstanding section 36, Hill's Code, which gives to an unmarried woman over twenty-one years of age a right of action for her own seduction.
2. IDEM.—While a jury may consider seduction in estimating damages for a breach of promise to marry, they are not obliged to do so, and an instruction that the jury "must" so consider it, is prejudicial error.
3. BREACH OF PROMISE—STATEMENTS BY PLAINTIFF.—In an action for breach of promise of marriage, in which defendant denies having made the offer, evidence that plaintiff, in the absence of defendant, told other persons of the engagement, is inadmissible.
4. BREACH OF PROMISE—EVIDENCE.—In an action for breach of a promise of marriage, it is proper to show how the parties were treated by their friends, and their own conduct towards each other. *Kelly v. Highfield*, 15 Or. 277, approved and followed.
5. EVIDENCE OF REPUTATION OF WITNESS.*—It is not competent to show the reputation of a witness for truth and veracity unless such reputation has been attacked. *Sheppard v. Yocum*, 10 Or. 413-414, approved and followed.
6. PRACTICE IN SUPREME COURT—MANDATE.—The mere fact that a party against whom a judgment for costs has been entered in the supreme court is insolvent, is not ground for withholding the mandate.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This appeal is brought by the defendant, H. D. Winters, to reverse a judgment recovered against him by May Osmun, in an action for a breach of promise of marriage. The complaint avers a mutual promise of marriage between the plaintiff and defendant, made on or about the seventeenth day of January, eighteen hundred and ninety-two, to be performed on or about the second day

*NOTE.—On this point see also *Cooper v. Phipps*, 24 Or. 357.—REPORTER.

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of May, eighteen hundred and ninety-two, and a postponement thereof at the request of the defendant until the second day of August following; and "that on or about the tenth day of April, eighteen hundred and ninety-two, in the city of Portland, county of Multnomah, and state of Oregon, the defendant invited the plaintiff into his parlor in defendant's building, situated on the northeast corner of Fifth and Davis Streets, in said city, county and state, and while there, under promise of marriage, the defendant took improper liberties, seduced, and had carnal intercourse with said plaintiff, and thereafter, by repeated promises of marriage, induced plaintiff to continue said sexual intercourse with said defendant, and to live with him, and by reason thereof this plaintiff has suffered great mental anguish, her health was greatly impaired, and her character and reputation ruined," and further avers a breach of contract by the defendant on or about the fourteenth of August, eighteen hundred and ninety-two. The answer contains a specific denial of all the allegations of the complaint, and for a separate defense avers that plaintiff was an unchaste, lewd, and lascivious woman, specifying certain acts of lewdness on her part, all which were unknown to the defendant at the time the several alleged promises of marriage were entered into. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of ten thousand five hundred dollars, from which defendant brings this appeal, alleging error in the admission of testimony and in the instructions to the jury.

REVERSED.

Mr. James Finley Watson (Messrs. Edward B. Watson and R. B. Beekman on the brief), for Appellant.

Mr. Alfred F. Sears, Jr. (Messrs. Austin F. Flegel, Henry Stanislausky, Patrick J. Bannon, Henry E. McGinn, and Nathan D. Simon on the brief), for Respondent.

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Opinion by MR. JUSTICE BEAN.

The first question arises upon the following instruction: "This is an action for a breach of promise of marriage, and although there has been a good deal of evidence introduced here bearing upon the question of seduction, which is set up in the pleadings of the case, you must not consider seduction as the principal element in the case. All that can be claimed for or gained by the charge of seduction in these pleadings is an aggravation of damages, and you have nothing to do with that question unless you first find that there was a promise of marriage, and that the promise was broken. The defendant denies that there was any seduction. The plaintiff alleges that there was a seduction; and before you can make any use of that matter of seduction in determining the case, you must find the fact that there was a seduction substantially as alleged. And then, if you find from the whole matter—the whole case—that the promise of marriage was made, and justification for breaking off the promise has not been proven, and that there was seduction, then you must consider the seduction as well as the allegations of justification for refusing to carry out the promise of marriage, in assessing the damages." To all that portion of this instruction relating to seduction, and directing the jury to consider the same as an element of damages, the defendant excepted, and now assigns the same as error. Several objections are made to this instruction, and of these in their order. First, it is contended that there is no sufficient allegations in the complaint of seduction under a promise of marriage; but in this contention we are unable to agree with counsel. It seems to us that by a fair construction of the complaint it is averred that the alleged seduction was under a promise of marriage.

1. It is contended that seduction cannot be alleged

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and proved as an element of damages in an action for a breach of a promise of marriage. Upon this question there is some slight conflict in the books, but the decided current of authority, both in this country and England, is that, while damages for seduction, as a distinct ground of action, cannot be added to the damages which plaintiff is entitled to recover for a breach of the promise to marry, it may, if alleged, be shown in aggravation of damages, on the ground that compensation for the injury she has received by the breach of the contract cannot be justly estimated without taking into consideration the increased humiliation and distress to which she has been exposed by the defendant's conduct. The action is nominally for a breach of contract, but the damages are awarded upon principles more commonly applicable to actions of tort; and, if seduction is brought about by a reliance upon the contract, it may in no very indirect way be said to be a breach of its implied conditions. "Such an engagement," says Mr. Justice CAMPBELL, "brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee, or guardian, or confidential adviser, who cheats a confiding ward, or beneficiary, or client, into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection. But in case of seduction there is added to this a loss of character, and social position, and not only deeper shame and sorrow, but a darkened future. All these spring

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directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong; but a refusal to marry makes the seduction a very grievous element of injury that cannot be lost sight of in any view of justice": *Sheahan v. Barry*, 27 Mich. 219. The common-law practice is substantially uniform in admitting such evidence, and is, we think, based upon sound principles: 3 Sutherland on Damages, 316; Cooley on Torts, 510; 1 Bishop on Marriage, Divorce, and Separation, § 232; *Hattin v. Chapman*, 46 Conn. 607; *Sauer v. Schulenberg*, 33 Md. 288, 3 Am. Rep. 174; *Kniffen v. McConnell*, 30 N. Y. 285; *Sherman v. Rawson*, 102 Mass. 395; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; note to *Weaver v. Bachert*, 44 Am. Dec. 178; *Berry v. DaCosta*, L. R. 1 C. P. 331; *Millington v. Loring*, 6. Q. B. Div. 190.

But it is claimed that, our statute (section 36) having given a woman over twenty-one years of age a right of action for her own seduction, the reason of the old rule has ceased, and it ought not to prevail in this state. This would seem to be the opinion of Mr. Parsons, for he says: "By the strict rules of the law they (damages for seduction) should, we think, be excluded where the plaintiff was in actual or constructive service, or lived in a state in which the statute law gave her an action for seduction, and not otherwise; and the weight of authority seems to be so." But he seems to think that while the strict rule of law would exclude the evidence as irrelevant, it would be impracticable to keep the fact of seduction from the jury without excluding other evidence to which the plaintiff would be entitled; and, when once admitted, the jury would probably regard it in estimating damages, and the courts would seldom disturb the verdict on that

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ground: 2 Parsons on Contracts, 70. No authorities are cited by Mr. Parsons in support of his view, and we believe none can be found in the adjudged cases. On the contrary, where the question has arisen in states giving the woman a right to maintain an action for her own seduction, it has uniformly been held that the rule of the common law is unchanged by the statute, and that seduction may be alleged and proved in an action for breach of promise of marriage. Thus, in Michigan the statute authorizes an action for seduction to be brought by any relative who may be selected by the woman of full age, and in *Sheahan v. Barry*, 27 Mich. 219, Mr. Justice CAMPBELL, answering a contention similar to the one made in this case, and assuming that the damages recovered in an action brought under the statute belong to the woman, says: "There are two considerations in the way of holding the rule changed by our statute. If it gives a remedy to the woman herself, it should, on common-law principles, be regarded as a cumulative remedy,—so far as the seduction under promise of marriage is concerned,—rather than as superseding the old one. And it is better for all parties, and more consonant with public policy, that where justice can be fully accomplished in one suit, no one should be driven to begin more than one. And where this rule is respected there can be no danger of injustice by a second prosecution. The maxim that no one shall be twice vexed for the same cause of action will always prevent any plaintiff from suing twice for the same damages. If they can be recovered in this action under the pleadings, a recovery in this will necessarily be a bar to any future action. This subject was recently considered in the case of *Leonard v. Pope*, 27 Mich. 145.

So, also, in *Haymond v. Saucer*, 84 Ind. 3, it was held, under a statute like ours, that seduction could be con-

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sidered as an element of damages in an action for a breach of promise, Mr. Justice Woods saying (page 11): "The fact that seduction accomplished under some circumstances is a crime is no reason why it may not be the subject of a civil action; and if, instead of making a separate cause of action, the injured party chooses to plead it as a cause for aggravation of damages in a suit for a breach of the promise of marriage under which it was accomplished, there is no good reason why it may not be done." Several other states contain similar statutory provisions, but we have not been able to find a single case in which it has been held that evidence of seduction in an action for breach of promise of marriage is not admissible on that ground. The rule allowing seduction to be alleged and proven in such an action is but a rule of damages based upon the theory that a plaintiff is entitled to compensation for mental suffering, injury to reputation, loss of virtue, and the shame and disgrace caused by defendant's conduct, and ought not to be varied because of the possibility of another action. And from the Michigan and Indiana cases it would seem that if a plaintiff chooses to allege and prove seduction in an action for breach of promise in aggravation of damages, the judgment in such action would be a bar to a further action by the woman under the statute for her own seduction.

It is also claimed that there is no evidence in this case tending to show seduction. The plaintiff testified that the defendant had illicit intercourse with her on or about April tenth, eighteen hundred and ninety-two, and, from her statement of the circumstances under which it occurred, we think the jury would have been justified in inferring that she was not an unwilling participant, although she says it was accomplished by force and without her consent. This was a question for the

jury and there was evidence sufficient to justify its submission to them.

2. It is also claimed that the court erred in instructing the jury that if they found from the evidence that the promise of marriage was made, and justification for breaking off the promise had not been proven, and that there was seduction, then they "must" consider the seduction in assessing the damages. In actions of this character the question of damages belongs exclusively to the jury, subject, of course, to the power of the court to set aside the verdict if against the evidence, or when excessive damages are allowed. There are no hard or fast rules by which the amount can be determined; each case must be dealt with according to its own particular circumstances. While seduction under a promise of marriage may be alleged and proven in aggravation of damages, yet it is for the jury alone to determine what weight, if any, is to be given to such testimony, and what effect it will have in determining the amount of damages to which plaintiff is entitled. That portion of the instruction complained of, deprived the jury, in case they found the facts referred to, of all discretion upon the question as to whether they should consider the seduction in assessing damages. They were told that in that event they "must" so consider it. Such we do not understand to be the law. In an ordinary action for a breach of contract, the amount recovered is limited to the actual damages caused by the breach. To this rule there is an exception in an action for breach of promise of marriage, because, although founded on contract, it is regarded as being somewhat in the nature of an action founded upon tort; but the cases sustaining the exception go no further than to hold that it should be left to the good judgment and discretion of the jury whether or not there should be added to the damages naturally

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resulting from a breach of the contract anything on account of seduction accomplished under the promise. In the case of *Jacobs v. Sire*, 23 N. Y. Superior Ct. 1063, in an action for breach of promise of marriage, the court instructed the jury that if they believed from the testimony the defendant had purposely and maliciously wronged the plaintiff, they were bound to give what are called exemplary damages, but the court held this instruction error upon the ground that it deprived the jury of all discretion upon the question whether exemplary damages should or should not be given. The court said: "Sedgwick and other text writers on damages agree upon the proposition that where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury, and it is erroneous to instruct the jury to give exemplary damages, for the plaintiff can never recover them as a matter of law." So, in this case, we think it was error for the court to instruct the jury that if they found a promise was made, and there was no justification for the breach, and that seduction occurred, they "must" consider the seduction as an element in estimating the damages; and under the evidence we cannot say it was harmless error. From plaintiff's own testimony it appears that she was not inexperienced in the ways of the world, but was of mature years, had been married, and became engaged to the defendant, who is an old man, within two weeks after her first acquaintance with him; that she left the home of her aunt and uncle, where she was living, and went to defendant's rooms, where she claims to have been seduced, and lived with him as his "promised wife" for some time before the alleged seduction took place, and continued to live with him afterwards without complaint; and that the alleged seduction was not disclosed to any person or

known by any one except the parties until the plaintiff consulted counsel for the purpose of bringing this action. Under these circumstances it was prejudicial error to tell the jury that if they found the seduction they must consider it in estimating the damages. It should have been left to the sound judgment and discretion of the jury, under all the circumstances of the case, with the direction that they should exercise their own judgment, and consider the seduction or not as to them might seem just and proper.

3. The next alleged error is in permitting Emma Dodge, Walter Dodge, and Danville Dodge, the aunt and uncles of the plaintiff, to testify in her behalf, against the objection of defendant, that she told them,—the defendant not being present,—on the day she claims the promise to have been made, that she was engaged to marry the defendant. This, we think, was incompetent, and should not have been admitted. There is a class of authorities holding that when the offer of marriage by the defendant is shown, and the question of the acceptance of the offer by the plaintiff becomes material, it is competent to show such acceptance by her actions and conduct not in the presence of the defendant: *Hutton v. Mantell*, 6 Mod. 172; *Peppinger v. Low*, 6 N. J. L. 384; *Moritz v. Melhorn*, 13 Pa. St. 331; *Thurston v. Cavenor*, 8 Iowa, 155. These cases recognize that the admission of such evidence is an exception to the general rule of law, based upon the peculiar nature of the contract, which is generally made in secret, and to which witnesses are not called to attest, and had its origin in the supposed necessities of the case. The foundation for this doctrine rests upon the decision of *Hutton v. Mantell*, 6 Mod. 172, in which there was no question as to defendant's offer, and which was rendered while the parties to an action were yet ineligible as witnesses, and was probably based upon

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the fact that such evidence was, in the language of some of the latter cases, "frequently the only, and ordinarily the best and most satisfactory, evidence of the existence of the engagement." But the reason for this rule has ceased, and, under our system, which permits all parties to testify in their own behalf, it is not apparent why any different rule of evidence should now prevail in this class of cases than that which prevails in other cases. But if it be true that cases may arise—where the offer of marriage on the part of the defendant is shown, but the acceptance by the plaintiff is disputed—in which her conduct and declarations may be competent to show her assent, no such question is presented by this record. Here there was no question as to the assent of the plaintiff if an offer was made by the defendant, but the important question made by the pleadings, and vigorously contested throughout the entire trial, was the alleged promise on the part of the defendant, and concerning this the plaintiff was permitted to fully and freely testify in her own behalf, and there was no reason for allowing her to use her bare declarations, made without the knowledge or consent of the defendant, to support her case. Every reason which exists for the exclusion of such evidence in other cases forbids with equal force its use in a case of this nature.

As was said by MORSE, J., in *McPherson v. Ryan*, 59 Mich. 39, 26 N. W. Rep. 321: "The plaintiff, as courts and juries must ever be constituted, has certainly advantage enough of the defendant, without giving her the opportunity of fabricating, by her acts and declarations, without his consent or knowledge, evidence to make a case against him. It would place almost any man at the mercy of an evil disposed and designing woman. An adventuress could come into court and swear to a promise

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of marriage, and then bring others of like ilk, her friends and intimates, to sustain her with testimony of the stories she had told them in furtherance of her plan to secure damages. There is no necessity of throwing open the doors of courts to such opportunities to work injustice. When the plaintiff has the equal right with the defendant to place fully before the jury the story of her wrongs, aided, as she will ever be, by the sympathy always recorded to both the weakness and the beauty of her sex,—a sympathy which the most rigid administration of justice cannot entirely prevent,—right and equity demand that she shall no longer have the aid which the law refuses in all other cases.” There is another class of cases which holds that when a promise of marriage by the defendant is shown, in pursuance of which plaintiff has made preparation for the marriage, her declarations and statements accompanying and in explanation of such preparations are competent as evidence to show her acceptance of the promise and in aggravation of damages: *Westmore v. Mell*, 1 Ohio St. 26, 59 Am. Dec. 667; *Reed v. Clark*, 47 Cal. 194; *Dunlap v. Clark*, 25 Ill. Ap. 573. But these cases are not applicable to the question presented by this record, because the declarations of the plaintiff admitted were simply her bare, bald statements, that she was engaged to the defendant, and it would be an unwarranted relaxation of the rules of evidence to sustain the admission of such testimony. The tendency of the modern decisions is to apply the same rule of evidence in cases of this nature as in other cases, and it has even been held that evidence of preparations for the marriage are inadmissible: 1 *Rice on Evidence*, 862; *Russell v. Cowless*, 15 Gray, 582, 77 Am. Dec. 391; *Walmsley v. Robinson*, 63 Ill. 41, 14 Am. Rep. 111; *Graham v. Martin*, 64 Ind. 567; opinion of MORSE, J., in *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. Rep. 321; *Lawrence v. Cooke*, 50 Me. 187, 96 Am. Dec. 443.

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4. As the other questions suggested in the brief will probably not arise on another trial, it is unnecessary to notice them at this time, except to say that we think the evidence of the manner in which plaintiff and defendant were received and treated in the lodge was competent as tending to show the manner in which they were received and treated by their neighbors and friends, and their conduct toward each other: *Kelly v. Highfield*, 15 Or. 277, 14 Pac. Rep. 744.

5. The evidence tending to show plaintiff's reputation for truth and veracity to be good was not competent unless such reputation had previously been attacked: *Sheppard v. Yocum* and *DeLashmutt*, 10 Or. 402; *Thompson on Trials*, § 555. The judgment is reversed and a new trial ordered.

REVERSED.

IN THE MATTER OF THE PETITION OF APPELLANT THAT RESPONDENT BE REQUIRED TO PAY THE JUDGMENT OF THE SUPREME COURT IN FAVOR OF APPELLANT FOR COSTS AND DISBURSEMENTS BEFORE THE MANDATE SHALL ISSUE.

Mr. James F. Watson, for the Petition.

It is admitted that the respondent, May Osmun, is entirely insolvent, and has no property whatever out of which the judgment against her in this court can be made. In this case it seems unjust that this woman, whose case seems quite speculative, should be allowed to harass and annoy the appellant by continuing this litigation without paying the costs and expenses to which she has already put him on the trial of this appeal. He has no remedy against her for them, it is but just and right that before she pursues him further she should pay up

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this judgment for expenses which she has compelled him to pay. We have no authorities to cite except such as were cited in the case of *Woodward v. O. R. & N. Co.* 23 Or. 331, where a somewhat similar question was before this court. In that case as in this plaintiff had a judgment below which was reversed by this court on the appeal, but in that case a considerable length of time had elapsed before the respondent applied for the mandate. This court decided in that case, as we understand it, that it was inequitable on account of the lapse of time with other reasons, that the mandate should issue in favor of respondent without payment of the judgment for costs. In that case as in this, respondent was insolvent and had no property out of which the judgment could be made. It seems to us that the only distinction between that case and this is in the bare lapse of time. We further suggest that with their lapse of time ought not to make any difference. The main equitable reason for refusing the mandate was that it was unjust that respondent should be permitted to continue to harass the appellant by the prosecution of this suit without paying appellant the costs to which he had already put him on the appeal. We respectfully suggest that time could not add to or take away any rights respondent might have to try his case in the court below.

Mr. Alfred F. Sears, Jr., contra.

The appellant bases his petition upon the fact that the respondent has no property upon which an execution might be levied, and unless the court require the mandate held he will be unable to collect his costs, or, to put it in his own language, "the respondent will be unable to pay his costs on appeal and hence if the order is granted she cannot proceed with her suit," the order in this case being in the nature of a perpetual bar to further proceedings.

Per Curiam.

We will admit that such would be the effect upon the respondent that she has neither money nor property, but on the other hand declares that she has a legal, moral, and righteous cause of action against the appellant. Our statutes does not provide for such an order. We have been unable to find a single reported case upon the subject, and this is not a case where any principle of the common law could be invoked, hence we must conclude that there is no law authorizing this court to make the order and grant the petition. We submit that to compel the plaintiff to pay the judgment of appellant before the mandate can issue might amount to a denial of the right to maintain an action at all; and that in the absence of a statute or rule of law authorizing such proceeding, the court lacks the legal power to announce such a rule. We have searched the authorities to find any one sustaining such a view without success. If the payment of an indebtedness existing upon the part of a plaintiff toward a defendant is to be a condition precedent to the right to maintain an action, it should be made so by virtue of some enactment of law. No court is inherently possessed of such power.

Appellant relies upon a similar order made by this court in the case of *Woodward v. Railroad Company*, 23 Or. 331, but from what we are able to learn, an entirely dissimilar case. If the determination of the question therein precludes any further inquiry, then we accept the result; but if this court does not consider that case as determining this question, and if the matter in controversy is still an open question before the court, we submit that the claim of appellant is without authority of law to sustain it.

PER CURIAM.

It is now ordered that the motion of appellant for an order requiring the respondent to pay the judgment in

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this court for appellant's costs and disbursements before the issuance of the mandate, be and the same is hereby overruled and denied.

DENIED.

[Argued December 19, 1893; decided January 8, 1894.]

CRAFT v. NORTHERN PACIFIC RAILROAD CO.

[S. C. 85 Pac. Rep. 250.]

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48	9
48	18

PARENT AND CHILD—DEATH BY WRONGFUL ACT—CODE, § 34.—The word "child," as used in section 34, Hill's Code, providing that "a father, or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the death or injury of a child," means a minor child.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

The plaintiff commenced an action in the circuit court of Multnomah County to recover from the defendant two thousand dollars on account of the death of her son, Benjamin P. Craft, who was run over by one of the engines of the defendant, and from the effect of which he died on August fifteenth, eighteen hundred and ninety-two. At the time of his death, it is alleged that the deceased was twenty-one years of age and over, that he resided with and was a member of the family of the plaintiff, and was cared for and supported by her, and that he also contributed of his wages to her support, and that by his death she has suffered and will continue to suffer great discomforts and pecuniary loss by reason of being deprived of the aid and assistance which her said son, Benjamin P. Craft, was accustomed to contribute to her support. The complaint alleges that the husband of plaintiff and father of deceased had, long prior to the commencement of the suit, deserted his family.

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The action is based on section 34 of Hill's Code, which provides that "A father, or, in case of the death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward." A demurrer was filed to the complaint, upon the ground that the right of action given to a parent for the injury or death of a child applies solely to a minor child, and that the right of action for the injury or death of an adult child survives to the personal representatives and is to be enforced under section 371 of Hill's Code, which provides that "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person." The circuit court sustained said demurrer, and rendered judgment for the defendant; from which this appeal is taken.

AFFIRMED.

Mr. Edward B. Watson (Messrs. Jas. Finley Watson and B. B. Beekman on the brief), for Appellant.

The case of *Catherine Putman v. The Southern Pacific Company*, 21 Or. 230, is in many respects similar to the present, but presents two important grounds of difference. There the deceased was not only an adult, but married, and living with his wife apart from his mother's family; here the deceased son was single, living in the mother's house and a member of her family; in the former the family relation was, in fact, severed; in the latter, that

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relation continued in full force and without interruption: *Putman v. Southern Pac. Co.* 21 Or. 230. The question is thus directly presented here whether the term "child" in section 34 of Hill's Code can in any case be held to include an adult.

The term "child" primarily, and ordinarily, signifies relationship. Webster: "A son or daughter; a male or female descendant in the first degree; the immediate progeny of human parents." Bouvier: "The son or daughter in relation to the father or mother." Rapalje: "As a technical term in legal instruments, the word 'child' is generally construed to mean a legitimate as opposed to an illegitimate child." And wherever the term has been held to refer to age, the subject or context has required it. But while the rules of interpretation sometime impute a secondary meaning, such as "youth" or "tender years," it is a most significant fact that the term "child" in a statute has never been held to mean a person under age. The law has always furnished terms of precise and technical meaning, to designate persons who have not attained their majority, as "minor" and "infant," and where neither of these is used, the court should have a clear warrant from the subject or context, before feeling justified in supplying them.

And while the term "child" ordinarily denotes relation and not age, the term "minor" and "infant" exclusively refer to age, and have no significance whatever as to any family relation. The terms "child" and "minor" or "infant," not being synonyms, the burden is on respondent to satisfy the court, that as used in this statute, it has the unusual meaning attached to it: Endlich on Stat. § 2.

The burden thus resting on respondent is not a light one by any means, for the rule is well established that "where a term used in a statute has acquired at common

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law a settled meaning, that is ordinarily the technical meaning which is to be given to it in construing the statute": Endlich on Stat. § 3. And the reason is, "because they have a definite meaning which is supposed to have been understood by those who were or ought to have been learned in the law": *Brockett v. R. R. Co.* 14 Pa. St. 241, 53 Am. Dec. 534. We think the rule of literal interpretation applies here in full force. The question for the court "is not what the legislature meant, but what its language means": Endlich on Stat. § 7.

Here as the term "child" alone can never be interpreted to mean a "minor" or "infant," one of the latter words must be interpolated before it is in the statute, by judicial construction to sustain the respondent's claim. The grounds for adding to a statute must be not only cogent, but irresistible: *U. S. v. Coombs*, 12 Pet. 72; *Siemens v. Sellers*, 123 U. S. 276; *Lyman v. Walker*, 35 Cal. 634. And it is only where the language employed in its ordinary meaning, leads to a manifest contradiction of the apparent purpose of the act, or to some such inconvenience, absurdity, hardship, or injustice, as the legislature could not reasonably have intended, that an unusual meaning can be given to words, much less other distinct words interpolated: Endlich on Stat. § 295. This is not a case of interpretation; the question here is not whether the legislature has employed a word in one of its several recognized meanings—the word "child" has neither in technical nor common use any relation to legal minority; and the issue here is whether a distinct word, such as minor, or infant, can be added by construction, and the ordinary as well as technical sense of the word "child" qualified and changed.

It will be conceded that such a construction can only be given to carry out the plain intention of the legislature. But the intention of the lawmaker must first be

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sought in the language he has used. If the words employed, in their ordinary, or any recognized meaning, disclose an intelligent purpose, there is an end to construction which would add to, or take from, the text, a single word. The court may suspect, or even be fully convinced, in its own breast, that something different was intended, but it cannot go outside of language that is neither meaningless nor contradictory, to enforce a possible, or even probable different meaning: Endlich on Stat. § 13; *Poor v. Considine*, 6 Wall. 458.

Sections 34 and 371 of Hill's Code are *in pari materia*, and therefore to be construed together: "Laws made by the same legislature, or upon the same subject, or relating expressly to the same point," are *in pari materia*, and "are to be taken together as if they were one law": Potter's Dwaris on Stats. § 189; Sutherland on Statutory Construction, §§ 283, 288; Endlich on Stat. § 45; *Smith v. People*, 47 N. Y. 330. The two sections under consideration here were the first legislation on the subject of death by wrongful act in this state giving a cause of action for damages. They were adopted by the same legislature, at the same session, and as parts of the same act. Besides, there is an express reference in section 369 which manifestly connects them as parts of one whole. This section, which stands first under the same title as section 371, declares that nothing in said title shall be construed so as "to defeat or prejudice the right of action given by section 34."

The legislature had both sections in mind. What was the probable object of this reference? Not to protect the parent's claim for damages for loss of the child's services during minority, most assuredly. Such damages never could have been claimed as a loss to the child's estate in the action by its personal representatives, as the services themselves would not have gone into its estate if

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death had not intervened. But by the law of December sixteenth, eighteen hundred and fifty-three, then and ever since in force, it was declared "That parents shall be bound to maintain their children when poor and unable to work to maintain themselves; and children shall be bound to maintain their parents in like circumstances": Statutes, 1854, p. 360. Here was a legal obligation on the child, of whatever age, to support its indigent and helpless parents, just as binding and far more sacred than that of rendering services during minority, but far more likely to be confused with the remedy given to the personal representatives, to which the proviso in section 369 might, with much more reason, be held to refer.

But the act of December sixteenth, eighteen hundred and fifty-three, on the subject of the support of parents who "are poor and unable to work to maintain themselves" is even more clearly *in pari materia* with section 34 than section 371. A parent in the condition specified in that act would suffer a loss of support by the death of the child, which it would if living be under a legal obligation to provide. Section 34 was plainly intended to give the parent a remedy for loss suffered in the death of the child; and it has always been so construed. Now this loss of support and the loss of services during the child's minority refer to the same basis of legal obligation, and result from the same wrongful act. Why should one loss be compensated and the other ignored? They are equally within the spirit and letter of section 34. And they are equally just and well founded in antecedent legal obligation. And if the legislature is presumed to have had in mind the common-law obligation of the child to render services during minority, there is even stronger ground for presuming that it was not unmindful of the statutory obligation of the child to provide support for its indigent and

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helpless parents, which it had itself created. And similar statutes in other states have been held entitled to consideration in construing provisions like those contained in section 34: *City of Chicago v. Keefe*, 114 Ill. 229, 55 Am. Rep. 860; *Denver, etc. Ry. Co. v. Wilson*, 12 Col. 20.

The history of legislation on this important subject only tends to confirm the view for which we contend. Lord Campbell's Act of eighteen hundred and forty-six was the first legislation on the subject of any importance. The hardship of the common law which allowed parents no recovery for loss of services of a minor child, after its decease, had been a familiar subject of discussion and judicial opinion in the courts of England from a remote period. But when the British Parliament undertook to legislate, it did not confine the remedy to that species of loss alone. It did just what every intelligent legislative body would have been expected to do under such circumstances. It enacted remedial provisions commensurate with the loss. New York followed in eighteen hundred and forty-seven with a similar act, which has been construed as embodying the same general principles: *Tiffany's Death by Wrongful Act*, § 19. Gradually legislation upon the subject spread all over the United States, reaching Oregon in eighteen hundred and sixty-two, as shown by the two sections under consideration, which was not slow considering her position and means of communication in early days. But all this legislation originated with Lord Campbell's Act of eighteen hundred and forty-six, and the point we claim for this is, that unless in the particular case there is some clear expression to the contrary, the act ought to be construed as framed on the same principles, and intended to accomplish the same purpose. And such we believe has been the uniform tenor of judicial decisions in this country.

And it has particularly been so held in Indiana, from

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whose statutes we unquestionably borrowed the form in which those principles are embodied: *Mayhew v. Burns*, 103 Ind. 328.

Under Lord Campbell's Act, as well as the statute of every state in the union, which has been held to be framed on the same principles, unless there is an express limitation to the contrary, the circumstance of minority or majority of the child is treated as of no importance. The language of Lord Campbell's Act, and of the various statutes referred to, differs little in form and nothing in substance from our own. They employ the term "children" or "next of kin" instead of "child," but it is obvious that there is nothing in these merely nominal differences to indicate any distinction either in the measure of damages or the principles involved in their computation. For the expression "next of kin" includes child, and to the same effect as if so expressed. But when it appears that the child is "next of kin" and an adult, then the same question arises as that presented here, whether a minor was intended by the statute.

But under all these statutes the courts hold that majority or minority makes no difference; that it is the actual loss which give the measure of damages: *Dalton v. Railway Co.* 93 E. C. L. 296; *Franklin v. Railway Co.* 3 Hurl & N. 211; *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499; *Railroad Co. v. Kirk*, 90 Pa. St. 15; *Mayhew v. Burns*, 103 Ind. 328; *Houston, etc. Ry. Co. v. Cowser*, 57 Tex. 293; *Commonwealth v. Railroad Co.* 107 Mass. 236; *Baltimore, etc. Ry. Co. v. State*, 60 Md. 449; *Railroad Co. v. Mahone*, 63 Md. 135; *Potter, Admr. v. The C. & N. W. R. Co.* 21 Wis. 377, 44 Am. Dec. 548; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504; *Denver, etc. Ry. Co. v. Wilson*, 12 Col. 20. We desire also to call the court's attention to the opinion in *Putman v. Southern Pacific Co.* 21 Or. 230, not as a binding authority, but for its review of the above

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cases and general views on the construction of the statute; and we rely with confidence upon the conclusions there announced. The present case is a stronger one for the appellant, in the fact that deceased was unmarried and a member of appellant's family.

Mr. Jos. Simon (Messrs. Cyrus A. Dolph and Rufus Mallory on the brief), for Respondent.

The common law, with its usual disregard of sentimental considerations, affords a parent as such no remedy for an injury to his child. He can only recover for his pecuniary loss thereby: *Sawyer v. Sauer*, 10 Kan. 519. The statute of 9 and 10 Victoria, commonly called "Lord Campbell's Act," remedied to a considerable extent the hardship and injustice of the common-law rule forbidding actions for injuries causing death, and statutes of the same kind, though varying in their provisions, have been passed in most of the states.

Where the right of action is given to the personal representatives for the benefit of the widow and children, etc., the beneficiaries cannot personally sue: *Weidner v. Rankin*, 26 Ohio St. 522; *Nast v. Tousley*, 28 Minn. 5; *Wilson v. Bumstead*, 12 Neb. 1; *Morovy v. Chaney*, 43 Iowa, 609. And in such a case the widow or father of the deceased, though the sole beneficiary, cannot sue: *Kramer v. Market St. R. R. Co.* 25 Cal. 434; *Hazen v. Kean*, 3 Dill. 124.

We contend that the word "child" in section 34 is to be construed minor child, and that the right of recovery for the injury to or death of a child provided for in such section is limited to a minor child, and it was not thereby intended to give the parent a right of action for the injury to or death of an adult child. That such is the proper construction to be given to the section is apparent from the language employed. "The father * * may

Argument of counsel.

maintain an action as plaintiff for the injury or death of a child, and the guardian for the injury or death of his ward." The right of the parent is put upon the same basis as that of the guardian. The language used clearly indicates that the legislature intended to confer a right of action in favor of the parent or guardian for the pecuniary loss sustained by reason of the injury to or death of such child while the family relation existed between them and during the minority of such child. The section under consideration gives a right of action for an injury to the child as well as for the death of such child. If an adult child is injured by the negligence of another, he has a clear and undoubted right of action in his own behalf and may recover damages for the injury so sustained. If the contention of appellant is correct, then the father or mother would also have a right of action for the same injury. It certainly could never have been intended to allow two recoveries for one injury. It therefore seems to us that the only reasonable and logical interpretation of sections 34 and 371, is to construe such sections as giving a parent or guardian who sustains loss by the injury of or death of a child, an action for such loss in his own right under section 34, if such child at the time of its injury or death was a minor, and by giving a right of action under section 371 to the personal representatives for the benefit of the estate on account of the loss sustained by reason of the injury or death of an adult child.

Again, the construction contended for by appellant would result in the father or mother deriving the sole benefit of both recoveries almost invariably. In the case at bar that result would certainly follow, because it appears that the mother is the sole heir of the estate. She has also been appointed administratrix upon his estate, and has brought another action against the defendant

Per Curiam.

under section 371, to recover damages, all of which will inure to her benefit. An interpretation of these two statutes so as to permit this double recovery will, in our judgment, not commend itself to the sense of justice of this honorable court.

The supreme court of Washington, in construing a statute identical in terms with section 34, held in effect that the word "child" in such statute was to be interpreted minor child: *Hedrick v. Ilwaco R. & N. Co.* 4 Wash. The supreme court of this State, in the case of *Putman v. Southern Pacific Co.* 21 Or. 230, had the precise question involved in this case under consideration. It is apparent, from a reading of the opinion first rendered, that the court was led into error in its investigation of that case, and that upon a rehearing the court receded from the views at first entertained, and thereupon correctly announced the law upon the question presented. The opinion of the court upon the rehearing sustains the contention made by us that the only right of action a parent or guardian has, under section 34, is for loss of services during the minority of the child, and that such section limits the recovery for the injury to or death of a minor child, and that the right of action for the injury to or death of an adult child is confined to the personal representatives of the deceased under section 371 of Hill's Code.

PER CURIAM.

As this case involves the same question decided in *Putman v. S. P. Co.* 21 Or. 244, we are of the opinion that the right of action given by section 34, Hill's Code, to a parent or guardian for the injury or death of a child, is confined to minority, and that the view expressed on rehearing in that case should control and be decisive of the present case.

Judgment affirmed.

AFFIRMED.

Statement of the case.

[Argued November 21, 1893; decided January 29, 1894.]

COLEMAN v. OREGONIAN R. R. CO.

[S. C. 35 Pac. Rep. 656.]

LIENS ON RAILROADS—PRIORITIES—LAWS, 1889, P. 75.—The lien on railroads given by Laws, 1889, p. 75, attaches only for the amount actually due to the principal contractor from the railroad company at the time the notice is served; previous transfers of or liens upon such fund will take precedence of the notice provided by said act.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This was a suit brought by R. R. Coleman against the Oregonian Railroad Company to foreclose a subcontractor's lien under the act of February twenty-fifth, eighteen hundred and eighty-nine: Laws, 1889, p. 75. From the pleadings and evidence it appears that in August, eighteen hundred and ninety, the defendant corporation contracted with one Burch to furnish three thousand cords of wood, to be delivered in certain quantities and at stated intervals, alongside its railroad track, for which it agreed to pay two dollars and forty cents a cord, on the twentieth day of each month, for the wood delivered during the preceding month. In October, eighteen hundred and ninety, Burch sublet to plaintiff a contract for cutting the wood at a stipulated price per cord, to be paid as payments were made to him by the company. On January twentieth, eighteen hundred and ninety-one, there was due the plaintiff, on his contract with Burch, the sum of eleven hundred and thirty dollars for wood cut and delivered during the preceding month, and for which the company was indebted to Burch in the sum of fourteen hundred eighty-eight dollars and twenty-five cents. In order to secure a lien upon the property of the company for the money due him, the plaintiff, on Janu-

Opinion of the court—BEAN, J.

ary twenty-second, eighteen hundred and ninety-one, served a notice in writing, as required by section 2 of the act of eighteen hundred and eighty-nine, on the manager of the defendant corporation, at its principal office in the city of Portland. Prior to the service of this notice, however, the money due Burch from the corporation had been garnished under an execution issued on a judgment in favor of one Dawson, recovered in an action brought by him against R. Burch, whom we think the evidence clearly shows to be the same person to whom the company was indebted, and the money had been paid over to the sheriff on the execution. The lien was sustained to the full extent by the court below, and the defendant appeals.

REVERSED.

Mr. Lewis L. McArthur (Messrs. Earl C. Bronaugh, Wm. D. Fenton, Earl C. Bronaugh Jr., Wm. M. and Harry M. Cake on the brief), for Appellant.

Mr. William T. Muir, for Respondent.

Opinion by MR. JUSTICE BEAN.

Upon these facts the important question for decision relates to the priority of lien between a judgment creditor of a railroad contractor who has duly garnished or levied upon the amount due his debtor from the company, and a subcontractor who, subsequent to the service of the garnishee process, gave the notice of lien required by the act under consideration. Section 1 of the law which governs the rights of the plaintiff in this case provides that any person who shall, as subcontractor, material-man, or laborer, furnish to any contractor of a railroad corporation any fuel, ties, materials, supplies, or other article or thing, or who shall do or perform any work or labor for such contractor, in conformity with the

Opinion of the court—BEAN, J.

terms of any contract which such contractor may have with a railroad corporation, shall have a lien upon all the property, real, personal and mixed, of said railroad corporation; "*provided*, such subcontractor, material-man, or laborer shall have complied with the provisions of this act, but the aggregate of all the liens hereby authorized shall not in any case exceed the price agreed upon in the original contract to be paid by such corporation to the original contractor. Nor shall such corporation be liable for any greater sum than the amount then actually due by such corporation to said original contractor; *and provided further*, that no such lien shall take priority over existing liens." Section 2 provides, in substance, that the person performing such labor shall cause a notice in writing of his intention to claim such lien to be served upon the officer of the corporation upon whom service of summons may be made, at the principal office of the company. This statute, in effect, provides that every subcontractor, material-man, or laborer performing work or furnishing material for any contractor of a railroad company may, upon compliance with its terms, acquire a lien upon the property of the company to the extent of the amount due from it to the original contractor at the time the prescribed notice is given. It differs in many important particulars from the ordinary mechanics' or laborers' lien law. No provision is made for recording or filing the notice of lien in any public office, nor is there any other means provided whereby the purchaser or mortgagee of a railroad may acquire knowledge of such notice. It does not undertake to give a direct or absolute lien upon the property which has been enhanced in value by the labor or material of the lienor, nor upon the fund due the contractor from the company, but only confers upon a subcontractor, laborer, or material-man, the right to intercept and cause to be paid to him the

Opinion of the court—BEAN, J.

amount due his contractor, by giving the prescribed notice, and, if not so paid, to enforce the same as a lien against the entire property of the company; and this without any record being made or notice given of his lien other than a notice to the railway company. It is merely a means provided by which a subcontractor, laborer, or material-man who furnishes labor or material to a railroad company through a contractor may be substituted for him as a creditor of the company, to the extent of its indebtedness to such contractor at the time the notice is given, with the additional right, not given the contractor, to enforce the same as a lien against the entire property of the company if not paid.

The lien can be acquired only in the manner provided by law,—that is, by giving the prescribed notice,—and, when thus acquired, attaches only for the amount then actually due the contractor from the company. Prior to the notice, the subcontractor, laborer, or material-man has no lien, but is in the position of a general creditor, with no preferential right to be paid for his labor or material out of the fund due the contractor from the company. He may acquire a lien by giving the prescribed notice, but until he does so, no lien can attach in his favor; and, the debt due the contractor being subject to garnishment at the suit of his other creditors, the right of the attaching or execution creditor is not overreached by the notice subsequently given. The notice creates and originates the lien, and the statute provides that the corporation shall not be liable for any greater sum than the amount due the contractor at the time the notice is given and the lien attaches. If, therefore, before such notice, some general creditor, pursuing the remedies given by law, has acquired a right by garnishment under an attachment or execution, to have the entire debt applied in satisfaction of his claim, there is nothing “then” due the con-

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tractor for which the lien can attach. The subcontractor, laborer, or material-man acquires a specific lien when he gives the prescribed notice; but up to that time he is nothing more than a general creditor, without any superior qualities over other creditors, and, when he does acquire a specific lien, it is subject to the rights of other persons acquired in good faith.

We understand the rule to be, from the authorities, that under a statute like this, which gives a lien upon the giving or filing of the prescribed notice, the lienor takes his lien subject to the rights of other persons, and that whatever rights such persons may assert in or to the fund, as against the contractor or owner, whether arising from contract or operation of law, may be asserted against a subcontractor, laborer, or material-man, who might have acquired a lien by giving the notice, but has omitted to do so: 2 Jones on Liens, § 1286, *et seq.*; *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229; *Dorestan v. Krieg*, 66 Wis. 613, 29 N. W. 576; *Oraig v. Smith*, 37 N. J. L. 549; *Copeland v. Manton*, 22 Ohio St. 398.

It is claimed that the implication to be drawn from the provision that the lien given by this statute shall not take priority over existing liens is that no lien on the fund due the contractor shall have preference. This argument assumes that the subcontractor, laborer, or material-man has, or can acquire, a lien upon the debt due the contractor from the corporation. But no such right is given him by the statute. His lien, when acquired, is not upon any debt owing the contractor, but upon the property of the company for the amount actually due the contractor at the time the notice is given. The provision concerning existing liens is only designed to render the subcontractor's lien subject to liens upon the property of the company, and does not affect the

Points decided.

question as to whether there is any debt actually due the contractor within the meaning of the law at the time the notice is given, when the debt has been previously attached at the suit of a general creditor. By giving the notice required by the statute, the subcontractor, laborer, or material-man is substituted for the contractor with the right to enforce as a lien against the property of the company, whatever claim the contractor himself might enforce against the company. If, at the time the notice is served, the contractor has no claim which he could enforce against the company, because the same has been assigned or attached, then manifestly the subcontractor can acquire none by serving his notice.

It follows from these considerations that the lien acquired by plaintiff was subject and subsequent to the rights of Dawson, and the decree of the court below must be reversed.

REVERSED.

[Argued January 15; decided January 29, 1894.]

NUTT v. SOUTHERN PACIFIC CO.

[S. C. 35 Pac. 652.]

1. **DUTY OF MASTER TO PROVIDE SAFE AND SUITABLE APPLIANCES FOR THE USE OF SERVANTS.**—An employer is not a guarantor that the tools or appliances provided for the use of employes are absolutely safe, or free from all defects; he is only under obligation to use reasonable diligence and care in so providing. *Knahtla v. Oregon Short Line Co.* 21 Or. 144, and *Kincaid v. Oregon Short Line Co.* 22 Or. 35, approved and followed.
2. **IDEM.**—It is sufficient if an employer furnishes his employes with reasonably safe and suitable appliances, and he need not furnish appliances of a particular kind.
3. **EXPERT TESTIMONY.**—The question as to whether the lowering of heavy tiles from a flat-car to the ground by rolling them down skids with a rope placed around them and snubbed to a post or stake was a safe method of unloading the tiles, is not a proper subject of expert testimony, the work not requiring any special skill or knowledge.

25	291
133	180
25	291
38	299
25	291
39	270
25	291
42	333
42	342
25	291
46	37

Opinion of the court—LORD, C. J.

4. INJURY TO SERVANT — MISLEADING INSTRUCTION.—In an action by a section hand against a railroad company for personal injuries, an instruction that the jury, in assessing damages, might consider, *inter alia*, plaintiff's "condition and station in life," was misleading, as it might mean either his physical condition and occupation, or his social and pecuniary position.

APPEAL from Josephine: H. K. HANNA, Judge.

This is an action brought by Alonzo Nutt against the Southern Pacific Company to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendant while unloading some heavy tiling from a flat-car. The trial resulted in a verdict for the plaintiff, and from the judgment which followed this appeal is prosecuted.

REVERSED.

Messrs. Earl C. Bronaugh and Wm. D. Fenton (Messrs. Lewis L. McArthur and Earl C. Bronaugh, Jr. on the brief), for Appellant.

Mr. Robert G. Smith (Mr. G. W. Colvig on the brief), for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

The complaint charges, *inter alia*, that "the defendant negligently failed to provide the plaintiff with suitable tools or appliances for carrying on such labor," etc., and that, by reason thereof, he was seriously injured. The evidence tends to show that at the time the plaintiff was injured he was engaged as a section hand in unloading some heavy pieces of tiling, weighing from fifteen hundred to eighteen hundred pounds each, from a flat-car; that the agent of the defendant unloaded such tiling by means of a small rope, skids, and other appliances; that a tile was let off the car upon the skids by a rope

fastened under the car, brought up and around the tiling, and back to a stake at the side of the car, around which it was passed, and "snubbed off" in lowering the tile to the ground; that the plaintiff was engaged in the work of "snubbing off" such rope, and that, while so engaged, the stake gave way, and struck him with great force, inflicting the injury complained of. Upon this state of facts, the court charged the jury generally that "it is the master's duty to furnish safe and suitable appliances for his employés, for their safety and protection," etc., and, in applying the law as thus stated, proceeded to say, in substance, that if the jury found that the plaintiff was employed by the defendant as a section laborer, and, at the time specified, was engaged in assisting to unload a car of heavy tiling, and if they found that such tiles "were ponderous and heavy objects, incapable of being handled without the aid of tools and appliances, then, in that case, you are instructed that it was the duty of the defendant to furnish said laborers with suitable and safe appliances and tools to perform said labor, and that it could not delegate that duty to any person, whether a vice-principal or common servant, so as to exonerate the defendant from liability from any defect in the tools or appliances furnished, or for any failure to furnish safe tools and appliances for use in said work." It thus appears that the trial court regarded and treated the duty of the defendant to furnish its employés with safe and suitable tools for the work at which they were engaged as absolute, and that it could not escape liability for any defect in them, whereby an injury resulted, although the company may have exercised due care and prudence in providing tools and appliances reasonably safe for use in such work.

1. The defendant is not a guarantor that the tools, implements, or other appliances which it provides for the use

Opinion of the court—LORD, C. J.

of its employes are absolutely safe, or free from all defects. Neither individuals nor corporations are bound to insure the absolute safety of the instrumentalities which they furnish their employes for use in their employment. Their duty is discharged when they exercise reasonable care and diligence in providing their employes with reasonably safe tools and appliances with which to work. While such duty is positive, it does not go to the extent of guaranteeing the safety of such implements, but its proper discharge requires the observance of such care as will not expose the employes to hazards and dangers which might be guarded against by proper diligence. As the employer assumes the duty of exercising due care and diligence to provide the employe with reasonably safe tools and machinery for use in his employment, so the employe, when the employer discharges such duty, assumes the risks and hazards incident to his service in the use of such tools and machinery. The general principles of the law in regard to the employer's liability for an injury to an employe, growing out of defective tools and appliances, or the selection of incompetent servants, etc., are well settled in this court. In *Kincaid v. Oregon Short Line Ry. Co.* 22 Or. 35, 29 Pac. Rep. 3, the court said: "The defendant is not an insurer that its cars and appliances are in a safe condition. The measure of its duty is to exercise reasonable care in this regard, and, *prima facie*, it is presumed to have done so." So in *Knahtla v. Oregon Short Line Co.* 21 Or. 144, 27 Pac. Rep. 91, BEAN, J., said: "It is the duty of the master to exercise reasonable care to provide safe and proper appliances for the use of a servant, * * * and for a violation of such duty he is liable in damages for the injury": *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311, 19 Pac. Rep. 765; *Hartvig v. North Pac. Lumber Co.* 19 Or. 522, 25 Pac. Rep. 358; *Miller v. S. Pac. Co.* 20 Or. 285, 26 Pac. Rep. 70; *Willis v.*

Opinion of the court—LORD, C. J.

Or. Ry. & Nav. Co. 11 Or. 262, 4 Pac. Rep. 121. Within the purview of these decisions, it was the duty of the defendant to use reasonable care and prudence for the safety of its workmen engaged in unloading the heavy tiling from the flat car, by providing reasonably safe and suitable appliances and machinery for use in such work; hence the defendant was not bound absolutely to furnish the plaintiff with safe and suitable machinery and appliances, nor liable for any defect in them, except such as might be guarded against by the exercise of reasonable care and diligence.

2. Another objection relates to the testimony of certain witnesses who seem to have been called as experts for the purpose of showing that the manner of lowering the tiles from the car with a "snub" rope was not as safe as if a block and tackle had been used. The question to one of these witnesses was, "Is it generally customary, or has it been your experience, to use a block and tackle to unload heavy material from the railroad cars?" The object of this question was to ascertain from the witness whether, in his opinion, a block and tackle might not have been a better appliance with which to unload the tiling than such as was provided for that purpose. An employé is not required to provide machinery or appliances of any particular kind or description in the conduct of his business, provided the machinery and appliances which he furnishes for the use of his employés are reasonably safe and suitable for the purpose. In such case the inquiry is, not whether better appliances might have been furnished, but whether the defendant is chargeable with negligence in furnishing the machinery and appliances which were used. "The question," said Mr. Woods, "is not whether the master might have provided better machinery, but whether the machinery employed was suitable and proper for the business, that is,

Opinion of the court—LORD, C. J.

whether it was a suitable instrumentality for the business": Woods on Master and Servant, 332-334.

3. Nor do we think the work of lowering the tiles to the ground by rolling them down skids with a rope placed around them, and then wrapped around a post or stake run through the stake pocket and gradually snubbed off, involved any work of special skill or knowledge which required expert evidence. The necessity for opinion evidence only exists where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them; but when the facts are such as can be detailed or described, and the jury are able to understand them and draw a correct conclusion from them without such opinion evidence, the necessity for it does not exist. We do not think the work of lowering these tiles involved special skill or knowledge beyond the range of ordinary observation and experience, or that the manner of doing such work, with the appliances in question, when sufficiently described to the jury, could not be made intelligible to them. We think such work belongs to the ordinary affairs of life which men in general are capable of understanding and comprehending, and that in such case the jury are capable of forming an intelligent judgment without the aid of the opinion of others.

4. The defendant also objects to an instruction in which the court charged the jury that it was for them "to determine from the evidence the amount of damages that plaintiff is entitled to, if any; and in assessing the same, you should take into consideration the nature and extent of his injuries, the results following therefrom, his physical pain and anguish caused thereby, his condition and station in life, and his earning capacity." The objection is that the jury are not allowed, in actions of this character, to take into consideration the plaintiff's "con-

Points decided.

dition and station in life" in estimating the damages. By these words it is claimed that the jury were authorized to consider, in assessing damages, the wealth or poverty, the rank or station in life, of the plaintiff. It is contended for the plaintiff, in view of the pleadings and the facts, that the plaintiff was employed as a laborer by the defendant and sustained the injury of which he complains in its service; that the word "condition" necessarily refers to his physical condition, as the word "life" does not follow it; and, likewise, that the word "station" relates to his occupation and not to his social or pecuniary position. As it is conceded that the words referred to in the instruction are calculated to mislead the jury, if they are susceptible of the construction claimed by the defendant, and, inasmuch as the case must be remanded for a new trial, these objectionable features may be avoided when the trial court comes to instruct the jury upon the matter of estimating the damages.

REVERSED.

[Decided January 29, 1894; rehearing denied.]

SMITH v. CITY OF PORTLAND.

[S. C. 35 Pac. 665.]

25	297
28	241
25	297
30	309
30	310
25	297
30	619
25	297
44	62

1. WRIT OF REVIEW—EVIDENCE.—A writ of review does not bring up questions as to the admissibility of evidence, but only questions as to jurisdiction, and as to the correctness of the judgment on the ultimate facts appearing in the record. *Douglas Co. Road Company v. Douglas Co.* 6 Or. 303, approved and followed.
2. PUBLIC IMPROVEMENTS—ALTERATION OF CONTRACT.—A committee of a city council, when entering into a contract for the construction of a public improvement with the successful bidder before the council, has no authority to insert in such contract items or terms not in the accepted bid; and the amount of such an item cannot be collected from the property assessed for the improvement.
3. PUBLIC IMPROVEMENTS—EXTRAS AND INCIDENTALS.—In the absence of a provision in the ordinance authorizing a public improvement, or a gen-

Statement of the case.

eral provision in the city charter, extras or incidentals incurred in making such improvement cannot be charged against the property benefited.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This is a special proceeding by Albert T. Smith and others to review the action of the common council of the city of Portland in the matter of assessments for the cost of constructing a sewer. The return to the writ shows that said council, on April twentieth, eighteen hundred and ninety-two, passed an ordinance providing for the time and manner of constructing Portland Heights sewer, establishing a sewer district, authorizing the committee on sewers and drainage to advertise for, receive, and report to the council bids for its construction, to enter into a contract therefor with the accepted bidder, and appointing assessors to estimate and report the cost to be assessed to the several owners of the property in said district. Thereupon the committee advertised for sealed proposals for the work, to be completed in accordance with the plans and specifications therefor, and, in answer thereto, five bids were received, of which the bid of twenty-two thousand five hundred and ninety-seven dollars and fifty cents, made by the American Bridge & Contract Company, was the lowest. The committee made its report recommending that the contract be awarded to the lowest bidder, which was upon motion adopted by the council, and said committee, on July fifth, in pursuance thereof, entered into a contract with the American Bridge & Contract Company for the construction of said sewer. The specifications provided for concrete where necessary, but, as it was impossible to tell in advance of the excavation for the sewer, that any concrete would be required, no estimate was made thereof by the engineer, and no mention was made of it in the accepted bid; but

Statement of the case.

when the contract was executed, the committee on sewers and drainage inserted the following item: "For all concrete used per cubic yard, twelve dollars," and under this clause four thousand three hundred and forty-four dollars and twenty cents was assessed upon the property within the sewer district. The assessors appointed to estimate the cost of said sewer made a report of the benefits to be assessed to each tract of land within the district, amounting in the aggregate to twenty-eight thousand three hundred and ten dollars and forty-five cents, which report was adopted by the council, and on December twenty-first, eighteen hundred and ninety-two, an ordinance declaring said assessment, directing the clerk to enter a statement thereof in the docket of city liens, and to publish notice of said assessment was passed. The sewer was completed according to contract, and city warrants amounting to twenty-seven thousand one hundred and sixty-seven dollars and seventy-five cents were, by order of the council, drawn upon the fund to be raised by said assessment, and delivered to the contractor, and an additional charge of one thousand one hundred and forty-two dollars and seventy cents was made for the wages of an overseer in superintending the work. On February fourteenth, eighteen hundred and ninety-three, warrants for the collection of the delinquent sewer assessments were, by resolution of the council, issued and delivered to the chief of police, and, on April third, the plaintiffs, whose property was liable therefor, commenced this proceeding to review the action of the council in relation to that portion of the assessment in excess of the contractor's bid.

The court, at the hearing, made findings upon all the facts in relation to the council's proceedings in the matter of the construction of said sewer, and, among others, the following: "That the committee on sewers and

Statement of the case.

drainage had no authority to enter into the contract the item 'For all concrete used per cubic yard, twelve dollars,' which amounts to four thousand three hundred and forty-four dollars, and that, in doing so, it exceeded its authority. That there is charged to said property the further sum of one thousand one hundred and forty-two dollars and seventy cents, no part of which was included in said bid nor in said contract, and the common council exceeded its authority in so charging the same to the property benefited by said sewer, and in attempting to collect the same. That the common council exceeded its authority in directing the auditor and clerk of said city to issue warrants for the collection of twenty-eight thousand three hundred and ten dollars and forty-five cents, or for any greater amount than the sum of twenty-two thousand five hundred and seventy-nine dollars and seventy-five cents. That the assessment upon the several tracts or parcels of land owned by the petitioners should be reduced in proportion that twenty-eight thousand three hundred and ten dollars and forty-five cents, the erroneous assessment upon the whole property, bears to what the true assessment should be, to wit, twenty-two thousand five hundred and seventy-nine dollars and seventy-five cents."

The court rendered a judgment against the defendants for the costs and disbursements, and annulled and set aside all the assessment upon the petitioners' property in excess of their proportion of the twenty-two thousand five hundred and seventy-nine dollars and seventy-five cents, from which the defendants appeal.

AFFIRMED.

Messrs. Jarvis V. Beach, City Attorney, and W. H. Adams, for Appellants.

Mr. John Catlin, for Respondents.

Opinion of the court—MOORE, J.

Opinion by MR. JUSTICE MOORE.

1. At the hearing the defendants offered to prove that the plaintiffs, A. T. Smith and others, appeared before the committee on sewers and drainage, and requested it to let the contract for concrete at the price agreed upon, without asking bids therefor, giving as a reason for their request that the season was so far advanced that further delay would postpone the work to their damage. The court having sustained an objection to this offer, the defendants took an exception to said ruling which was noted and allowed, and this is assigned as error. "The authorities," says SHATTUCK, J., "fully sustain the position that the writ of review only brings up the record of the inferior court, and that the superior court, upon review, tries the cause only by the record, and only as to questions of jurisdiction, and as to error in proceeding. It will not on review try questions of fact": *Douglas County Road Company v. Douglas Co.* 5 Or. 406. This doctrine was adhered to by the same learned judge, who, in speaking of the rule there adopted, said: "We adhere to that ruling, and repeat the decision that upon a writ of review under our statute, the superior court will not examine the evidence which was before the inferior court, nor try a new or mere question of fact, but will review the decision of the court below only upon the ultimate facts appearing in the record": *Douglas County Road Company v. Douglas Co.* 6 Or. 303. Courts will not examine the evidence, in such cases, when in the record, to determine whether questions of fact have been properly decided. It is only when there is an entire absence of proof on some material fact found, that the finding becomes erroneous as a matter of law: *Hyde v. Nelson*, 11 Mich. 353. If courts will not examine the evidence when in the record, they certainly will not examine it when, as in this case, it is no part thereof.

Opinion of the court—MOORE, J.

2. Appellants contend that the insertion of the price for concrete in the contract was not a judicial, but merely a ministerial, act of the committee, as was also the subsequent ratification thereof by the council, when the sewer was accepted, and warrants drawn and delivered to the contractor for the amount thereof, and therefore not subject to reviews. The council of a city exercises legislative, executive, and judicial powers. When an ordinance is passed, it is an exercise of the legislative power; when a contract is entered into in pursuance of an ordinance, it is executing the laws; but when it determines what property should be assessed, and the amount of benefits it has received, it exercises judicial power. When the council assessed the benefits upon the property within the sewer district, it was an adjudication that the property described in the docket of city liens was liable for the amount assessed, and therefore became a final judgment against it: *People v. Supervisors of Livingstone Co.* 43 Barb. 232; *People v. Morgan*, 65 Barb. 473; 2 Dillon on Municipal Corporations, § 926, note 3. To entitle a municipal corporation to recover from an abutter the expense of a local improvement, it must comply with all condition precedent, whether prescribed by charter or ordinance: 2 Dillon on Municipal Corporations, § 811. Section 4 of ordinance number sixty-four hundred and thirty-nine, entitled "An ordinance to provide for the time and manner of, and the letting of contracts for improving streets and constructing sewers, accepting work, drawing warrants, and making payments therefor," approved December ninth, eighteen hundred and ninety, and in force in said city when said contract was executed, provides that "As soon after the time fixed for receiving bids as practicable, the committee on streets, in case of street improvements, and the committee on sewers and drainage, in case of constructing a sewer, shall open the same, and report

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them, together with a summary of the several bids, to the common council. When so reported the common council shall award the contract or contracts, as the case may be, to the lowest and best responsible bidder, or bidders, if, in its judgment, such bid or bids be not unreasonable. All unreasonable bids, or bids for less than all of one class of work chargeable to one block, or that do not conform to the provisions of this ordinance, shall be rejected." When the American Bridge & Contract Company offered to construct the sewer for twenty-two thousand five hundred and ninety-seven dollars and fifty cents, the amount of its bid, and this was accepted by the council, the minds of the contracting parties met and agreed upon the terms, and, in pursuance thereof, the committee was authorized to enter into a contract with said company. This made the members of the committee the agents of the council to execute a mere ministerial duty, and gave them no authority to change its terms, and when they inserted in the contract the item: "For all concrete used, per cubic yard, twelve dollars," they exceeded their authority to that extent, and violated the provisions of section 4 of ordinance number sixty-four hundred and thirty-nine, by letting the contract without any bid for concrete. This is not a proceeding between the city and the contractor, but is one between it and the property owners affected by the assessment, and, as to them, it was not in the power of the council, under its ordinances, to make a contract that would bind their property for the payment of concrete, without a bid therefor; and hence no ratification by the council could bring into existence a power it did not possess in the first instance: 1 Dillon on Municipal Corporations, § 463; *Doughty v. Hope*, 3 Denio, 594; *In re Turfster*, 44 Barb. 46.

3. The appellants also contend that the employment of an overseer to superintend the construction of the sewer

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was necessary, and that a reasonable amount paid one for that service was properly chargeable to the property. Section 121 of the city charter provides that "The council shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer; * * * and when the council shall direct the same to be assessed on the property directly benefited, such expense shall, in every other respect, be assessed and collected in the same manner as is provided in the case of street improvements." The published notice of intention to construct said sewer described its location and informed parties interested that the council proposed "to designate and describe the district benefited thereby, and to assess the property within said district the necessary expense of building such sewer in accordance with the provisions of section 121 of the charter of the city of Portland." Section 3 of the ordinance authorizing its construction, passed in pursuance of said notice, provides that "said sewer, together with all manholes, catchbasins, and branches connected therewith, shall be paid for by the property benefited by the construction of said sewer, as provided by section 121 of the city charter of Portland." The charter nowhere directly provides that incidental expenses, not embraced within the actual cost of a local improvement, shall be chargeable to the property benefited. The notice of intention to construct said sewer might be construed to include such expenses, but the ordinance passed in pursuance thereof made no provision therefor. The authority under the charter to make local improvements is exercised by ordinance, which must with reasonable certainty prescribe a rule that will fully guide those who are to execute it, and give to those interested fair notice of how, and to what extent, it is to operate: Elliott on Roads and Streets,

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382. The ordinance in question does not provide that the incidental expenses of the construction of the sewer shall be chargeable to the property within the district, nor could it give to the owners fair, or any, notice that their property would be burdened by such expenses. The enumeration of manholes, catchbasins, and branches connected therewith would seem to exclude all other expenses under the maxim: "*Expressio unius est exclusio alterius.*" The assessment of benefits in excess of the contractor's bid having been made without authority, the judgment is affirmed.

AFFIRMED.

[Decided January 29, 1894; rehearing denied.]

CORBETT v. WRENN.

[S. C. 26, Pac. 658.]

25	305
36	497
25	305
37	552

1. **COVENANT AGAINST INCUMBRANCES KNOWN TO GRANTEE.**—The fact that an incumbrance not excepted from the operation of a covenant was known to the grantee is no defense to an action for breach of such covenant.
2. **PLEADING—ACTIONS SOUNDING IN CONTRACT OR TORT—CODE, §§ 67 AND 93.**—A complaint which alleges that defendant sold certain land to plaintiff with a representation and a covenant that there were no incumbrances thereon except a mortgage for a specified amount; that said representation was false, and was so known to be by the defendant when made; and that plaintiff purchased in reliance on said representation; and was subsequently compelled to pay a much larger sum to release said mortgage, is open to a motion to strike out, under section 85 of Hill's Code, or to a demurer for misjoinder of causes of action, under sections 67 and 93, since the allegations sound in both tort and contract; but in the absence of such pleadings it is properly treated as an action for breach of covenant.
3. **BREACH OF COVENANT—MITIGATION OF DAMAGES.**—In an action for breach of covenant against incumbrances, evidence for defendant that plaintiff paid off an outstanding incumbrance complained of before maturity, else he would not have had to pay more than he was allowed therefor on the purchase price, is inadmissible to defeat the action, as the covenant is in fact broken, although it might be allowed in mitigation of damages.

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4. BREACH OF COVENANT AGAINST INCUMBRANCES.—A covenant against incumbrances is broken so as to entitle the grantee to at least nominal damages, if at its date there was an outstanding incumbrance on the property not excepted from the operation of the covenant; and where the grantee pays off an incumbrance not excepted from the covenant, the amount so paid may be recovered from the grantor, less whatever the grantee may have agreed to pay for that purpose.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This is an action by Rebecca Corbett against S. E. Wrenn to recover damages for the breach of a warranty against incumbrances. The facts are that on August fifth, eighteen hundred and eighty-nine, the defendant was the owner of real property in Multnomah County, Oregon, known as Subdivision C in lot one of block five in Portland Homestead; that at said date there was a mortgage thereon executed by one R. H. Blossom, a former owner, to the Franklin Building & Loan Association, to secure the payment of a loan of two thousand three hundred dollars in six years from November twentieth, eighteen hundred and eighty-eight. The said loan was made upon twelve shares of the capital stock of said association, that were assigned to it by the mortgagor as collateral security for the payment thereof, with interest at the rate of nine per cent per annum, payable monthly after forty-five months, together with all dues, fees, assessments, and working expenses that might accrue upon said shares of stock, and also all fines that might accrue in accordance with the bylaws of said association by reason of delinquency in payment of said interest or otherwise. And it was stipulated in said mortgage that if at any time the said shares of stock were by the board of directors of said association adjudged to have reached, by payments thereon, the par value of two hundred dollars each, then there should be credited on said shares of stock all unpaid dues, fees, assessments, installments,

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working expenses, fees, and fines accruing thereon, and on the loan thereby secured, and said shares of stock should be thereupon canceled and surrendered to the mortgagor. On said fifth day of August there was due on said mortgage to the Franklin Building & Loan Association one thousand seven hundred and forty-five dollars and sixty-six cents, and on that day the defendant, for the expressed consideration of two thousand seven hundred dollars, sold and conveyed said real property to the plaintiff by a deed containing a covenant that said premises were free from all incumbrances, and that the grantor and his heirs, executors, and administrators should warrant and forever defend the same and every part and parcel thereof against the lawful claims and demands of all persons whomsoever. The plaintiff paid nine hundred dollars upon the execution and delivery of the deed, eight hundred dollars two years later, and one thousand nine hundred and ninety-seven dollars to the Franklin Building & Loan Association in satisfaction of its mortgage upon said premises.

The plaintiff, in substance, alleges that the defendant, at the time said sale was made, in order to induce her to purchase the premises, represented that he was the owner of twelve shares of stock in the Franklin Building & Loan Association, and that a sufficient amount had been paid thereon, so that, upon surrendering them to the association, the mortgage held by it would be discharged upon the payment of one thousand dollars, and that any other or further sum represented by said mortgage had been fully paid by the defendant, and that, relying upon said representations, she purchased said property and took an assignment of said shares of stock; that said representations were false, and known to be so by the defendant at the time they were made; that they were made for the purpose of misleading and defrauding

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her, and that she would not have purchased said property but for the said false and fraudulent representations; that there was then due upon the surrender of said stock one thousand nine hundred and ninety-seven dollars, which was well known by the defendant, and that by reason of said mortgage the said amount was a valid lien and incumbrance upon said premises, which she was compelled to pay in order to remove the incumbrance and discharge the lien thereof, and that said sum was paid for the use and benefit of the defendant; that at the time said purchase was made she did not know the amount necessary to pay off and discharge said mortgage, except as represented by the defendant, and did not learn the truth thereof until after the sale had been consummated. It is further alleged that the transaction between her and the defendant in relation to the purchase and sale of said premises was not reduced to writing until the execution and delivery of said deed, a copy of which is set out in *hæc verba*; that the amount named in said deed is the true and only consideration therefor, and the same has been fully paid by the plaintiff; that it was understood and agreed that upon the payment of two thousand seven hundred dollars, the plaintiff should receive from the defendant a perfect title in fee simple, free and clear of all incumbrances, and that the defendant in pursuance thereof executed and delivered said deed; that the defendant has failed to make good his statements and representations, and refused to carry out or make good his covenants of warranty, to the plaintiff's damage in the sum of nine hundred and ninety-seven dollars.

The defendant denied the material allegations of the complaint, and for a further answer, in substance, alleged: That in addition to the payments made by the plaintiff to him, she, in consideration for said conveyance, assumed

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said mortgage, which was then a valid lien upon the property, and of record in said county; that the plaintiff accepted an assignment of said shares of stock, and became a member of the Franklin Building & Loan Association, and subject to the rules and laws thereof, and that under said rules, and according to the usual course of business in said association, plaintiff would not have been compelled to pay off the said mortgage had she kept the said shares of stock until their maturity. The plaintiff having denied these allegations of new matter, the cause was tried, and the jury returned a general verdict in favor of the plaintiff in the sum of seven hundred and forty-five dollars and sixty-six cents, together with interest thereon from August fifth, eighteen hundred and eighty-nine, and special verdicts as follows: "Question 1. Were the representations referred to in the complaint as having been made by defendant or his agent to plaintiff as to the amount required to pay off the mortgages in question false? Answer.—Yes." "Question 2. If these representations were false, did defendant, at the time he made them, if he did make them, know them to be false? Answer.—Yes." "Question 3. If the said representations were false, and if defendant made them and knew them to be false at the time he made them, did he make them with intent to defraud the plaintiff? Answer.—Yes." "Question 4. If the said representations were false, and defendant made them to plaintiff, did he or his agent make them as a matter of opinion? Answer.—Yes; as a matter of opinion."

The court having overruled defendant's motion for a new trial, rendered judgment on the general verdict, from which the defendant appeals.

AFFIRMED.

Mr. Milton W. Smith, for Appellant.

Mr. W. L. Nutting, for Respondent.

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Opinion by MR. JUSTICE MOORE.

The alleged errors relied upon by the defendant may be divided into two classes: First, the rulings and instructions of the court treating the action as being for a breach of warranty and not for deceit; and, second, to the rejection of testimony offered by him. The errors assigned under the first class are: 1. In overruling defendant's motion for a nonsuit. 2. In refusing to instruct the jury to find for the defendant. 3. In giving the following instructions: "I have already stated to you that the gist of this action is a covenant of warranty against any incumbrance of the land, and we have to look at it in that point of view. If you believe from the testimony that the consideration of the purchase was nine hundred dollars cash, the eight-hundred-dollar note and mortgage, and one thousand dollars for the release of the mortgage upon the property held by the building and loan association, then the defendant became bound to clear the property of all liens, not included in these three items, viz., nine hundred dollars cash, the eight-hundred-dollar note and mortgage of her own making, and the one thousand dollars to the loan company; and, if he failed to do it, or if the one thousand dollars would not do it at that time, and more had to be paid in order to accomplish it at that time, then the defendant is responsible for the amount required to remove the lien of that mortgage, and free the property from incumbrance, and no more. As to what was due on the day of the execution of this deed to satisfy that mortgage, you will remember what the evidence of the witnesses was, whether it was seventeen hundred dollars and some odd dollars, more or less, whichever it was you will remember; and if you find that the agreement concerning the sale was that one thousand dollars only should be paid to the

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loan company by plaintiff, then whatever there was more than one thousand dollars,—whatever was needed on that date besides the one thousand dollars to pay off that claim, together with interest from the date on which the payments were made, should be awarded to plaintiff in this action,—the difference between one thousand dollars and the amount due the loan company at that date."

4. In rendering judgment against the defendant. If the above instruction, as given by the court, was correct, it will not be necessary to examine the other matters assigned as error under the first class.

1. The complaint contains all the necessary allegations of an action for a breach of the covenant against incumbrances: *Rawle on Covenants*, 114; 1 *Estee's Pleading* (3d Ed.), § 1270. The incumbrance was not excepted from the operation of the covenant, and the fact that plaintiff was aware of its existence when the deed was delivered, would have been no defense: *Rawle on Covenants*, 117; *Medler v. Hiatt*, 8 Ind. 171; *Snyder v. Lane*, 10 Ind. 424.

2. If this action be interpreted as one for a breach of the covenant, it follows that all allegations in relation to the representations of the defendant, his knowledge of their falsity, the intention with which they were made, and the plaintiff's reliance thereon, were unnecessary and immaterial, and might have been stricken out on motion. Deceit is an action sounding in tort, while covenant arises out of a contract, and a complaint in which they are joined is subject to demurrer: *Hill's Code*, §§ 93, 67. The authorities, however, are quite uniform in holding that unless the objection is taken by demurrer, it is waived: *Green on Pleading*, § 882. The object and purpose of a demurrer in such cases is to compel the opposite party to elect the cause of action or defense upon which he relies, and, as no demurrer to the

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complaint was filed in the case at bar, the court, under the rule that pleadings shall be liberally construed, (Hill's Code, § 84,) was justified in instructing the jury that the gist of the action was the alleged breach of warranty against incumbrances. This view disposes of the errors assigned under the first class.

3. The assignments under the second class are: "The circuit court erred in sustaining plaintiff's objection to the following questions propounded to the witness, H. H. Northup, and refusing to permit him to answer the same: "Examine this mortgage, which is marked 'Plaintiff's Exhibit D,' and state, if you know or can tell, how much would be due on that mortgage on August fifth, eighteen hundred and eighty-nine? Under the rules of the association, when would that mortgage become due?" In sustaining plaintiff's objection to the following questions propounded to the witness, A. C. Mackenzie, and refusing to allow him to answer the same: "Can you tell when that mortgage would become due?" "Can you tell how much Mrs. Corbett would have had to pay if she had continued her payments on the mortgage until it matured?" The bill of exceptions shows that "The defendant's counsel stated that the object of the questions propounded to Mr. Northup was to draw from the witness testimony to the effect that if plaintiff had paid off the mortgage when it became due, instead of paying it off prior to its maturity, she would have been compelled to have paid only the sum of one thousand dollars." "And that the object of each of said questions propounded to Mr. Mackenzie was to draw out the fact that if plaintiff had held the stock pledged as collateral security with the Franklin Building & Loan Association, until its maturity, or until the maturity of the said mortgage, instead of paying off the said mortgage and surrendering the said stock before their maturity, she would

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have been compelled to pay the sum of one thousand dollars and no more."

There seems to be no controversy in relation to the amount that plaintiff was to pay in order to discharge the incumbrance. Both parties appear to agree that one thousand dollars was the correct sum, and hence the true consideration is expressed in the deed; but the defendant contends that this sum was not payable until the maturity of the mortgage, unless the stock held as collateral security for the payment of the loan had reached its par value before that time, while the plaintiff contends that she was to have a perfect title to the property free from all incumbrances, upon the payment of the amount agreed upon. The chief question in issue was: When, under the agreement, was this sum payable? No response to the questions propounded to the witnesses Northup and Mackenzie, with the purpose avowed by counsel could have tended to determine this issue, and besides the mortgage would have furnished the best evidence upon this question.

4. The defendant, for the purpose of mitigating the damages, had the right to show by parol that the plaintiff had assumed and agreed to pay off and discharge the mortgage, as a part of the consideration for the conveyance: *Leland v. Stone*, 10 Mass. 459; *Spurr v. Andrew*, 6 Allen, 420; *Harlow v. Thomas*, 15 Pick. 66; *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352; *Medler v. Hiatt*, 8 Ind. 173; *Pitman v. Conner*, 27 Ind. 337; *Fitzer v. Fitzer*, 29 Ind. 468; *Sidders v. Riley*, 22 Ill. 111; *Laudman v. Ingram*, 49 Mo. 212. The reason assigned for the introduction of the evidence was not in mitigation of damages, but to negative the covenant, by showing that the mortgage could have been discharged at maturity upon the payment of one thousand dollars, and therefore the defendant was not liable on his covenant. The defendant being liable

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for at least nominal damages, the evidence was properly rejected.

Another reason for rejecting the evidence is that a covenant against incumbrances is broken if the land at the time of the conveyance is subject to an incumbrance not excepted in the deed, which upon its delivery entitles the vendee to nominal damages: *Rawle on Covenants*, 89. The doctrine is also well settled that if the covenantee has extinguished the incumbrance he is entitled to recover the amount paid for it: *Pillsbury v. Mitchell*, 5 Wis. 17; *Eaton v. Lyman*, 30 Wis. 39. As the mortgage to the association was a valid lien upon the premises at the time of the conveyance, not excepted from the operation of the covenant, which plaintiff has discharged, it follows that she is entitled to recover whatever sum she has paid out for that purpose in excess of the amount she had agreed to pay. The judgment of the lower court must be affirmed.

AFFIRMED.

[Argued Nov. 29, 1893; decided Jan. 29, 1894; rehearing denied.]

BUDD v. UNITED CARRIAGE CO.

[S. C. 35 Pac. Rep. 660.]

1. CARRIERS—RUNAWAY HORSES—PRESUMPTION OF NEGLIGENCE.—In an action for injuries to a passenger against a carrier operating coaches, evidence that the horses ran and kicked, and that the driver lost all control over them, raises a presumption that defendant, in disregard of its duty, provided wild and unsafe horses and a careless and incompetent driver.
2. CARRIERS—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—Where a passenger in a carriage is placed in imminent peril by the running away of the horses, and the driver calls on her to jump out, the question whether she is guilty of contributory negligence in so doing is for the jury.
3. IDEM.—A carrier cannot escape liability for an injury caused by driving a team over an unsafe road by showing that the injured passenger directed him to drive over such road.

Statement of the case.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This is an action brought to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. The complaint, after alleging that the defendant was a common carrier, and its undertaking to carry the plaintiff around and through the city, avers, in substance, that the defendant, in disregard of its duty, sent a team for this purpose which was fractious and unsafe,—that it was not properly and safely hitched to the carriage with safe gearing and appliances,—and that the driver which the defendant furnished to drive such team was negligent and incompetent. It also alleges, “that, while the plaintiff was being conveyed as aforesaid, said team, by reason of being wild, fractious, and unsafe, and being carelessly hitched to said carriage with unsafe gearing and appliances, and being driven by said careless and incompetent driver, became unmanageable and ran away, and said driver was wholly unable to control the team, and that plaintiff, being in imminent danger of life and limb, and believing herself so to be, at the request of said driver, in order to escape greater injury, attempted to get out of said carriage, and was thereby forcibly thrown to the ground, breaking and dislocating the bones of her forearm near the wrist, and otherwise greatly bruising and injuring her.” The answer admits that the relation of passenger and carrier existed between the plaintiff and defendant, but denies the alleged negligence and sets up contributory negligence as a defense. The evidence shows that the plaintiff informed the defendant, through the telephone, that she had a sick or invalid daughter whom she desired to take for a drive about the city, and requested the defendant to send to her residence for this purpose an easy carriage, with a safe and gentle team,

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and a careful and competent driver. In response to this telephonic order, the defendant sent a team hitched to a close carriage or coupé, with a driver, to her residence, and plaintiff and her sick daughter entered the carriage, and the driver, as directed by the plaintiff, proceeded to convey them with said team and carriage from place to place upon several business and social errands about the city. The plaintiff, noticing that the horses, when at a halt, were nervous and fidgety, asked the driver whether they were gentle and safe, and he answered that "the horses were all right." The evidence shows that she was induced to make this inquiry by solicitude for her sick daughter, whom she did not wish to be subjected to the excitement and fright likely to result if the horses proved intractable or unruly. When through with her errands, the plaintiff instructed the driver to convey them to the City Park, where, after driving around its driveways for some time, she told him to leave the park by way of Park Avenue, so as to pass a certain new residence located thereon which she desired to see. This avenue was graded out to the City Park line, but there was a declivity of one or two feet which the carriage had to descend in turning from the park driveway into it. In making this turn, when the wheels descended the pitch or declivity, the tongue flew up between the heads of the horses, the carriage ran forward, whereupon one of them got his leg over the trace and commenced kicking, and then both ran away kicking. As the horses were thus running and kicking the driver hallooed to the ladies, "For God's sake, jump out!" which they promptly did, the plaintiff's daughter jumping out on one side, and she on the other, causing the injury complained of.

As tending to show the conduct of the driver, and the behavior of the horses under the circumstances, one witness testified: "It seemed as though, just as the team

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started down the hill, one of the horses became frightened and commenced to kick; * * * as soon as the horses began to kick, the man got scared,—his actions indicated that from his performance. The driver immediately raised to his feet, and commenced to halloo. I could not understand what he said, but the horses were going down the hill at a rapid rate and kicking, and the driver did not seem to have any control over them at all. When the team got opposite of us, the carriage door opened and a woman fell out from the other side from where we were, and after going several feet another woman fell out on the other side," etc. Another witness testified that "the pitch was about a foot, and that when they came around, and made the turn to come into the road, the front wheels pitched down, and upon that the tongue flew up between the horses' heads, and one horse got his foot over the trace. Then they started forward again, and the trace straightened out under his hind leg, when the horse commenced kicking, and the man kept hallooing, and they kept coming over the hill in that shape." There was some further evidence tending to show that the team was not hitched to the carriage with proper gear, to enable the horses to hold the carriage back when going down a pitch or declivity.

Upon the part of the defendant the evidence tended to prove that the man in charge of the team at the time of the accident was a skillful, careful, and competent driver; that the team was safe and gentle, and was hitched to the carriage in a safe and proper manner, with safe harness and gearing; that the plaintiff had directed the driver where to go, and which way to drive, and that just before the accident she directed him to leave the park by Park Avenue, where there was a sharp declivity of one or two feet; that in driving down this declivity, in some unknown manner, one of the horses got his leg over a trace,

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which frightened him and caused him to kick, and, the carriage pushing forward on the horses, they commenced running down the street; that the driver checked the team to about a standstill, and requested the plaintiff and her daughter to alight from the carriage; that plaintiff's daughter stepped out without injury, but the plaintiff being greatly excited, jumped out hastily, and sustained the injury complained of. The trial resulted in a verdict for the plaintiff, and from the judgment which followed, this appeal is taken.

AFFIRMED.

Mr. John W. Paddock (Mr. Ossian Franklin Paxton on the brief), for Appellant.

Mr. Thomas O'Day, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

1. The record discloses that when the plaintiff rested the defendant moved for a nonsuit on the ground that the testimony was insufficient to sustain the allegations of the complaint, which motion the court overruled, and the defendant excepted. The contention for the defendant is, conceding that the driver was careless on the occasion of the accident, it shows but a single act of negligence, which is not of itself sufficient to establish his general incompetency; and, for a like reason, conceding that the team became unmanageable, and began to kick and run, under the circumstances indicated, it only shows that the team was intractable or unsafe on this particular occasion, which is not sufficient to establish the character of the team as fractious and unsafe. This contention is based on the hypothesis that the negligence alleged as the cause of the injury imposed upon the plaintiff the burden of proving that the team furnished by the defendant was habitually fractious and unsafe, and that the person

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provided by the defendant to drive such team was incompetent, or not possessed of the requisite skill and qualifications for that business. As a consequence, the defendant claims that the testimony for the plaintiff showing that she sustained an injury by jumping from the carriage by direction of the driver, while the horses were running and kicking, under the circumstances disclosed, although the relation of passenger and carrier existed between the plaintiff and defendant, is incompetent and insufficient to show that such injury resulted from the negligence alleged, and therefore the court erred in overruling the motion for nonsuit and submitting such evidence to the jury. From these considerations it will be observed that in the view taken by counsel he has wholly ignored the evidence in support of the allegation that the team was not properly hitched to the carriage with safe gearing and appliances, and confined his objections to the evidence in support of the allegations that the horses were unfit or unsuitable for the services required, and the driver incompetent and careless in the performance of his duty. He overlooks the fact that the complaint embraces nearly the whole field of the carrier's duty and obligations, and that evidence tending to prove negligence or failure to perform its duty in any essential particular alleged, adequate to have caused the injury, would be sufficient to sustain the verdict. But as the objection raised involves the same principle as an objection to an instruction given by the court to which an exception is reserved, its consideration becomes important and imperative. The real point of the objection is that the alleged negligence to which it refers, considered in connection with the evidence in support of it, does not make a case which comes within the principle, as sometimes briefly stated, that the happening of an injurious accident raises a presumption of negligence, and throws upon the defendant the onus of

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showing that it does not exist. The gravamen of the complaint is that, while the relation of passenger and carrier existed between the plaintiff and defendant, the former was injured by reason of the defendant's negligence in furnishing a fractious and unsafe team, which, not being properly hitched with safe gearing to the carriage, nor provided with a careful and competent driver, became unmanageable, and began to kick and run away, when the plaintiff, at the urgent request of the driver, attempted to get out of the carriage, and was forcibly thrown to the ground and injured. As the relation of carrier and passenger is admitted, does the fact that the plaintiff sustained an injury under the circumstances indicated make a *prima facie* case of negligence against the defendant?

The general rule undoubtedly is that in actions for personal injuries caused by the alleged negligence of the defendant, the plaintiff is required to produce some evidence of negligence to warrant the judge in submitting the case to the jury. "But when the cause of the accident is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence for the jury in the absence of explanation by the defendant, that the accident arose from want of proper care": *Scott v. London Docks Co.* 3 Hurl. & C. 596. The law imposes the duty upon the proprietor of a stage coach or other public vehicle to provide a reasonably safe conveyance, drawn by steady horses, with secure harness, and a skillful and competent driver. In the discharge of this duty, the carrier is bound to use the utmost care and diligence of cautious persons to prevent injury to passengers. In *Crofts v. Waterhouse*, 3 Bing. 321, Bost. C. J., said: "The coachman must have competent skill,

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and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But it is not meant by this language that a stage proprietor is a warrantor of the safety of his coach, its equipments, the competency of his driver, or other appliances used, but that he is bound to use the utmost diligence and care in making suitable provisions for those whom he carries. So in *McKinney v. Neil*, 1 McLean, 540, it is held to be the duty of a stage proprietor "to furnish good coaches, gentle and well broke horses, good harness, and a prudent and skillful driver," and that he is liable to any passenger who may receive an injury for any defect in these particulars. And GREENE, J., said: "With horses gentle and well broke, with coaches and harness good and strong, with drivers sober, prudent, and skillful, a stage coach line might be regarded as managed with human care and foresight": *Frink v. Coe*, 4 G. Greene, 558, 61 Am. Dec. 41.

The liabilities of the carrier arise from the duties which the law imposes, and, while he is not an insurer against all defects, his liability extends to such as might be guarded against by care and skill. So that, although the duty is not imposed upon him of conveying his passengers with absolute safety, yet his liability goes to the extent of requiring that he shall use all care and diligence in providing a suitable vehicle, safe horses and harness, and a qualified driver. This is based on the principle that, the means of transportation being under the management of the carrier, and their fitness for such service peculiarly within his knowledge, he is bound to

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be supplied with every reasonable requisite to insure the safety of his passengers. This being so, when the duty is performed in the ordinary course of things an accident would not be likely to happen, but when one occurs from some apparent defect in the means, appliances, men or apparatus employed by such carrier in the transportation, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of proper care. Hence, the rule is well settled that in an action by a passenger for personal injuries, when it is made to appear that the accident resulted from defects in the carriage or in the appliances, or in the want of skill of the driver, or in the unfitness of the team, the presumption of negligence arises, and the onus is cast upon the defendant to relieve himself of responsibility by showing that the injury was the result of an accident which the utmost care and foresight could not have prevented. When, therefore, a plaintiff establishes the relation of carrier and passenger, the fact that he received an injury from any defect in the instrumentalities which it was the duty of the carrier to furnish as a means of his transportation, makes a *prima facie* case of negligence against the carrier. The onus is then cast upon the carrier to show that he used reasonable care and diligence in providing a suitable conveyance, steady, and well trained horses, good harness and proper appliances for the journey, and a competent driver, who acted with reasonable caution and skill. In a word, if a carrier would relieve himself from liability he must rebut the presumption of negligence which arises from the happening of the accident by showing that the injury was not occasioned by any defect in the hack, or want of care or skill in the driver, or any neglect or want of diligence, or foresight on his part: *Christie v. Griggs*, 2 Campb. 80; *Jackson v. Tollett*, 2 Stark. 34; *Sales v. Western Stage Co.* 4

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Iowa, 547; *Farish v. Reigle*, 11 Grat. 711, 62 Am. Dec. 666; *Maury v. Talmadge*, 2 McLean, 157; *Stokes v. Saltonstall*, 13 Pot. 181; *Boyce v. California Stage Co.* 25 Cal. 468; *Treadwell v. Whittier*, 80 Cal. 589, 13 Am. St. Rep. 175, 5. L. R. A. 498, 22 Pac. 266; Story on Bailment, §§ 592-601.

In the case at bar the record discloses the circumstances under which the horses began to run and kick, the conduct of the driver on the occasion, and how the injury occurred to the plaintiff. The defendant claims that these circumstances afford no inference that it failed in its duty to provide a safe and steady team or a careful and competent driver. Counsel argues that the fact that the team ran and kicked, or that the driver was careless on this occasion, does not show that the team were addicted to this habit or vice, or that the driver was generally incompetent, and hence was not evidence that the plaintiff's injury was caused by reason of the defendant's negligence in providing an unsafe or unreliable team, or a careless or incompetent driver. This is putting the onus on the person who has no means of knowing the temper or character of the team, or the particular skill or qualifications of the driver, to show that the team is habitually vicious or unsafe, or that the driver is without the requisite qualifications for his position. In *Simpson v. Omnibus Co.* 8 L. R. (C. P.), 391, a passenger in an omnibus was injured by a blow from the hoof of one of the horses which had kicked through the front panel of the vehicle, but there was no evidence to show that this particular horse was vicious or a kicker. It was contended that a casual kick by one of the numerous horses employed by the company was no evidence of a want of due and reasonable care on its part. It was argued, as here, that a horse which has never kicked before may do so once without acquiring the character of being vicious, and hence that the burden of proving the horse unsafe

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rested on the plaintiff. But in that case, BOVILL, C. J., said: "In the present case a horse drawing an omnibus belonging to the defendants, without any assignable cause, kicks out, and strikes and injures the female plaintiff, who was riding in the vehicle. It seems to me that that alone presents a case which calls for some explanation on the part of the proprietors. It is said that it is the nature of horses to kick. But I think it ought not to be the nature of a horse employed to draw a public vehicle to kick. Proof having been given that the horse in question had misconducted itself in the way charged, the burden of showing that he was not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out was, I should say, *prima facie* evidence for the jury." In the present case, the fact that the horses ran and kicked, and the driver was unable to control them under the circumstances disclosed, tended to show that the defendant, in disregard of its duty, had provided wild and unsafe horses and a careless and incompetent driver as charged, and cast the onus upon the defendant of showing that such horses were not habitually unsafe or unmanageable, or the driver negligent or incompetent, or something to account for the running and kicking of the horses, or the inability of the driver to control them on this particular occasion.

In *Roberts v. Johnson*, 58 N. Y. 616, the evidence tended to show that while the plaintiff was getting out of the omnibus, the horses started, whereby plaintiff was violently thrown upon the ground and injured. GROVER, J., said: "This showed, *prima facie*, either that the horses were unsuitable for such service, or the driver incompetent or negligent in the performance of his duty. If the starting of the horses was attributable to some other cause, for which the defendants were not responsi-

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ble, it was for them to show it. This results from the fact that where proper horses and suitable drivers, who attend to their business, are employed, the horses will not start while passengers are getting into and out of the stage. If anything occurs causing such start, which is beyond the control of the driver or proprietor, they can readily show it. Such fact is peculiarly within their knowledge, while, in most cases, the persons injured would be entirely ignorant of it." So here, with equal reason, the fact that the horses misconducted themselves showed, *prima facie*, either that the horses were wild and unsafe for such service, or that the driver was negligent and incompetent in the performance of his duty. For, if the running and kicking of the team was attributable to some other cause for which the defendant was not responsible, it was for the defendant to show it, as such matter was peculiarly within its knowledge, and, generally, without the knowledge of the person injured. But there was other evidence. It was proved that the horses were without breeching, and that the pole was not firmly fastened down by some appliance, so that the horses could hold the carriage back and prevent it from running upon them, as happened when the team turned from the park into the avenue, in passing down a declivity of a foot or so, when one horse got his hind leg over the trace, and both horses commenced to run and kick. The evidence for the defendant fails to account for the horse getting his leg over the trace, but says that "in driving over this declivity in some unknown manner one horse got his leg over the trace."

The cases cited by counsel to the effect that the fact that a horse becomes unmanageable on one occasion does not show him to be vicious in disposition are in actions where no contractual relations existed between the parties, and those to the effect that a single act of negligence

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by a servant does not establish general incompetency are in actions where the relation of master and servant existed. As GORDON, J., said: "An employé, by his contract, is presumed to run the ordinary risks of the machinery and appliances he is engaged to supervise or use; he is also held to a knowledge of the character and obvious defects of such machinery and appliances, as well as the skill and habits of his co-servants. A passenger, on the other hand, neither can know, nor is presumed to know, anything about these things. He has paid his passage, and he is wholly passive in the hands and at the mercy of the transportation company and its agents. The doctrine advocated by the defendant's counsel by which the passenger would be put on a par with an employé will not do; it accords neither with reason nor precedent": *Phila. R. R. Co. v. Anderson*, 94 Pa. St. 359, 39 Am. Rep. 787.

2. Whether the plaintiff was contributorily negligent in jumping from the carriage, under the circumstances, depends upon whether her act was precipitate or rash, or such as a person of ordinary prudence might do. The evidence shows that the plaintiff was in a close coupé, that the horses were running and kicking, and that the driver, who appeared to be frightened and unable to control them, was calling excitedly to the plaintiff and her daughter, "For God's sake, jump out." These circumstances showed presumptively that the negligence of the defendant had placed the plaintiff in a situation of imminent peril. In such case the law does not require of the passenger the exercise of all the presence of mind and care of a prudent man; and if the plaintiff, in endeavoring to escape from such danger, either by following the directions of the driver, or the dictates of her own judgment, acted as a person of ordinary prudence would have done under similar circumstance, she was not negligent: 2 Am. &

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Eng. Enc. 766. Hence, whether she acted negligently or not, was a question of fact to be submitted to the jury. So also, in determining whether the plaintiff was negligent, the jury were not only to consider the presumption arising from the happening of the accident and injury, but all the facts and circumstances in evidence.

3. But, it is claimed, that, as the plaintiff directed the driver to go down the avenue so as to afford her an opportunity to view a certain house which was being erected, she assumed the entire control of the driving and therefore was responsible for the accident which occurred in traveling down such street. This contention relates to that portion of the charge in which the court said that "the plaintiff did not take the responsibility of the road being safe but left that to the driver's judgment." It is usual for persons who hire a carriage and driver to give general directions as to places where they desired to be conveyed, and the driver is expected to know whether the roads over which he must pass to reach the places to which he is directed to go are suitable and reasonably safe for passage. The carrier cannot escape liability for an injury caused by driving a team over an unsafe road by showing that the injured passenger directed or expressed a wish to travel over such road. As the court said in *Anderson v. Scholey*, 114 Ind. 553: "It is true the driver testified that he was in the road pursuing the right track, and that he pulled to the left, thereby upsetting the conveyance over the bank, because the plaintiff told him repeatedly he was too far to the right. The plaintiff denies this. However the fact may be, it was the duty of the defendants to supply the coach with a driver who knew the way for himself, and who would not be controlled by the suggestion of a passenger on the inside, while he occupied the seat charged with the duties and responsibility of driver." The fact is, there is no

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evidence that the road was unsafe. We do not think, therefore, that the evidence was incompetent, or that the court erred in refusing the nonsuit, or that there was error in the instructions. It follows that the judgment must be affirmed. **AFFIRMED.**

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[Argued January 18; decided February 14, 1894; rehearing denied.]

SNIDER v. JOHNSON.

[S. C. 35 Pac. 846.]

1. **RESULTING TRUST—STATUTE OF LIMITATIONS.**—The statute of limitations does not begin to run against an action to establish a resulting trust in lands until the *cestui que trust* in possession has been ousted.
2. **PAROL EVIDENCE TO ESTABLISH A RESULTING TRUST.**—Parol evidence is admissible to establish a resulting trust in land in favor of one paying the purchase price therefor, where another takes the legal title, notwithstanding a recital in the deed that the consideration was paid by the grantee, but the evidence of it must be clear and convincing, and if attended by doubt and uncertainty the writing must remain the highest and best evidence.
3. **EVIDENCE OF RESULTING TRUST.**—Where the testimony was conflicting as to whether land was bought with a mother's or her son's money, whether the bond for a deed was taken in her name for herself or to protect his interests as a minor, and whether she directed the deed to be made to him or to her, and the evidence showed that at her request the bond for a deed was never recorded, that the deed was made to the son, and that she delayed over twenty years before she demanded a deed to herself in accordance with his bond, a trust on behalf of the mother is not established.

APPEAL from Douglas: H. K. HANNA, Judge.

This is a suit by Elizabeth Snider against John Y. E. Johnson and wife to establish a resulting trust in land. The facts show that one Solomon Abraham, on May twentieth, eighteen hundred and sixty-nine, was the owner of lot eight, block twenty-seven, in Roseburg, Douglas County, Oregon, and on that day executed and

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delivered to plaintiff a bond for a deed, in which he covenanted to convey to her the legal title thereto in consideration of two hundred and seventy-five dollars, of which one hundred dollars was then paid, and the remainder was evidenced by plaintiff's note payable in one year. This bond was delivered to the county clerk of said county, but, by plaintiff's order, was not recorded. Abraham and his wife, on February fourteenth, eighteen hundred and seventy, in consideration of the payment of said note, conveyed said lot to the defendant John Y. E. Johnson, plaintiff's son, who was then aged about twenty years, and the deed therefor was on June twenty-third, eighteen hundred and seventy, duly recorded in said county. The plaintiff, about June, eighteen hundred and sixty-nine, moved into an old house on the north half of said lot, and occupied it until about October, eighteen hundred and seventy-five, when she moved into a new one erected upon the south half, where she resided until about September, eighteen hundred and eighty-three, when she removed to a new house built on the north half, which she occupied until about September, eighteen hundred and eighty-seven, at which date she went to Portland, Oregon, to make an extended visit. The defendant, John Y. E. Johnson married the defendant Elizabeth Johnson on March ninth, eighteen hundred and eighty-seven, and moved into the house on the south half, but, after the plaintiff went to Portland, occupied the one on the north half; and, when the plaintiff returned in May, eighteen hundred and eighty-eight, she was obliged to live in the building on the south half. The plaintiff alleges that she paid the consideration to Abraham for said lot, and, after the bond was executed, entered into a contract with her son, by which it was agreed that he should receive the legal title to the south half, in consideration of his living with and aiding plain-

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tiff in the support of her family, and applying what he could spare from his wages to the payment of the consideration; and further that the defendant had notice and knowledge of plaintiff's claim of ownership of the north half of said lot at the time said deed was executed, and has repeatedly admitted that he held the title in trust for, and promised to convey it to, her; and that, relying upon his admissions and promises, she has been lulled into security in consequence of which, and of her ill health, she had not commenced any proceedings to recover the title thereto until this suit was brought; and that, upon the execution and delivery of said bond, the plaintiff, in pursuance thereof, entered upon the north half of said lot, and ever since has been, and now is, in the actual, open, exclusive, and uninterrupted possession thereof.

The defendant, after denying the material allegations of the complaint, in substance alleges that said bond was taken in plaintiff's name for his use and benefit, and with the direct agreement that said lot should be conveyed by Abraham to him; that he paid the entire purchase price, and that said Abraham, with the consent and by direction of plaintiff, conveyed said premises to him; that he has, since the execution of said bond, been in the open, notorious, adverse, and exclusive possession thereof under claim of ownership; and that plaintiff's alleged cause of suit did not accrue within ten years prior to the commencement thereof; and that he has made improvements of the value of sixteen hundred and twenty dollars, and paid the taxes, amounting to one hundred and ten dollars, while in possession of the north half, which has enhanced the value thereof to that extent. The reply denied these allegations of new matter, and the cause, being at issue, was referred to John Hamilton to take the testimony, and, upon the report thereof, the court found that the equities were with the plaintiff, and

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that defendant held the legal title to the north half of said lot in trust for her, and decreed a deed of conveyance thereof, together with the costs and disbursements of the suit, from which the defendant appeals.

REVERSED.

Mr. J. W. Hamilton, for Appellants.

Mr. E. B. Preble, for Respondent.

Opinion by MR. JUSTICE MOORE.

1. The defendant contends that the plaintiff, having set up her cause of suit upon an alleged resulting trust, the plea of the statute of limitations may be interposed in bar thereof. The principle is elementary that time does not bar a direct trust when the relation of trustee and *cestui que trust* is admitted to exist, (*Manaudas v. Mann*, 22 Or. 525, 30 Pac. 422,) but courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que trust*: *Perry on Trusts*, § 141. There is, however, an exception to the application of this general rule in favor of a *cestui que trust* in possession of an estate. In such case the statute does not begin to run until he has been ousted: *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172; *Lakin v. Sierra Buttes Mining Co.* 25 Fed. 347; *Love v. Watkins*, 40 Cal. 569, 6 Am. Rep. 624; *McCauley v. Harvey*, 49 Cal. 497; *Altshul v. Polack*, 55 *Id.* 633. The record shows that plaintiff occupied the north half of said lot from eighteen hundred and sixty-nine to eighteen hundred and eighty-seven, except when a new house was being built thereon, and from eighteen hundred and seventy-five to eighteen hundred and eighty-three; and that she had never been denied the possession thereof until eighteen hundred and eighty-eight, and therefore the statute of limitations did not begin to run until that time.

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2. Where one purchases land with the money of another, and takes the title to himself, the courts presume from the transaction of the parties that a resulting trust arises in favor of him whose money paid for it: *Parker v. Newitt*, 18 Or. 274, 23 Pac. 246; 1 Perry on Trusts, § 26; and parol evidence is admissible to establish such a trust, notwithstanding a recital in the deed that the consideration was paid by the grantee: *Chenoweth v. Lewis*, 9 Or. 150. "The admission of parol evidence to establish a resulting trust has been often said to be 'one of the mistakes of a court of equity.' To raise a trust not expressed in the writing, the evidence of it must be full, clear, and convincing. If it is attended by doubt and uncertainty, the writing must remain the highest and best evidence": *Lee v. Browder*, 51 Ala. 288; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Whitmore v. Learned*, 70 Me. 276; *Parker v. Snyder*, 31 N. J. Eq. 164; *Boyd v. McLean*, 1 Johns. Ch. 582; *Rogers v. Rogers*, 87 Mo. 257; *Clark v. Pratt*, 15 Or. 304, 14 Pac. 418.

3. Considering the evidence in the case at bar for the purpose of determining its sufficiency under this rule, we find that the plaintiff admits in her testimony that fifty dollars of the amount paid when the bond was executed was realized from the sale of stock that the defendant had earned by his labor, but she claims that because he was then a minor this property was hers; that the other fifty dollars then paid she received from her husband's estate; that in order to obtain funds for the payment of the note, she did work for which she received from one person forty-seven dollars; that she did the washing for thirteen men and one woman, and that every five dollars that she obtained she deposited with Dr. S. Hamilton, and earned enough by transient washing to support her family; that she let a building on the south half of the lot, and the rents therefrom, together with every five or ten dollars

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that her son could spare, made up the amount to pay off the note; and when this amount was raised she sent her son to Oakland, Oregon, to pay it to Abraham; that M. M. Melvin, the county clerk to whom she had delivered the bond, brought the note and deed to her, and, when she discovered that the property was conveyed to her son, she refused to accept the deed, and directed Melvin to return it to Abraham. Melvin testified that he never saw the deed, and that plaintiff never told him to take it back to Abraham, or said anything about the bond after it had been delivered to him till this suit was commenced. The defendant testified that his father died in eighteen hundred and fifty-two, while crossing the plains, and that his mother married George W. Snider about eighteen hundred and fifty-five; that he lived with them till the summer of eighteen hundred and sixty-four, when he left home for the reason that his presence seemed to cause trouble between his mother and stepfather; that his stepfather died in eighteen hundred and sixty-five, leaving his mother with three small children, and that another was born soon after his death, all whom were girls; that upon Mr. Snider's death, his mother invited him to return and aid her in the support of her family, and then told him that he might keep whatever he could earn by his labor, and that thereafter he received his earnings and invested them in what he needed; that his mother at that time was very poor, and had no means except such as she received from her labor; that in eighteen hundred and sixty-nine he and his mother had a conversation in regard to the purchase of a home, and, learning that Abraham had a lot for sale, it was agreed that he should purchase it, but, being a minor, it was further agreed that his mother should take the bond therefor in her name, to protect his interests; and that she would instruct Abraham to make the deed to him when the purchase

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price was paid; that he worked and earned fifty dollars by sawing wood and other labor, which, with the fifty dollars realized from the sale of the cattle, constituted the one hundred dollars paid at the time the bond was executed; that he deposited his earnings with his mother and with Dr. S. Hamilton, until he had a sufficient amount to discharge the note, when he drew the money, paid it to Abraham at Oakland, and told him to execute the deed as his mother had instructed him; that he paid the whole consideration, and that his mother never paid any part thereof.

Solomon Abraham testified that while he could not remember the details of the transaction, he believed, from his careful method of doing business, that a deed made by him to Johnson must have been by his mother's direction; that he was living in Oakland at the time the deed was executed, but moved to Roseburg in eighteen hundred and seventy-five, and lived one block from the plaintiff's home till eighteen hundred and ninety; and during that time she never said anything to him about the deed till May ninth, eighteen hundred and ninety, when she demanded from him a conveyance of the whole lot, but at Portland, in the fall of that year, she demanded a deed for only one half of the property. J. H. Snider, plaintiff's stepson, testified that he lived with the plaintiff during the years eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, and that she many times said she was going to have the property deeded to her son. The plaintiff and her daughters testified that the defendant had frequently promised to convey the north half of said lot to his mother, and Laura La Forest testified that she heard him at one time make this promise. This the defendant denies. But these promises if made at all, the testimony shows, were made after the conveyances, and hence could not create a

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a resulting trust. To create such a trust the promise must have been in force at the time the deed was delivered. "And," says Mr. Perry in his work on Trusts, section 140, "if the nominal purchaser, under such circumstances should afterwards agree to hold in trust for, or to execute a conveyance to, the person who paid the money, courts would not enforce the agreement, if it was without a new consideration, or voluntary."

The evidence cannot be reconciled upon any theory, and the presumptions and inferences deducible from the acts of the parties must be relied upon for a solution of the question: 1. The bond by plaintiff's direction was never recorded. This fact would seem to support the defendant's theory that his mother was acting for him, and in his interest, and did not desire to make the bond a matter of record. 2. The fact that Abraham made the deed to Johnson is a strong presumption that he did so at plaintiff's request. 3. The fact that plaintiff for more than twenty years never made any demand upon Abraham to comply with the terms of his bond, seems to further show that the deed was executed according to her instructions. From these facts and circumstances it seems clear that the trust has not been established with that character of proof required in such cases, and for that reason the decree is reversed and the bill dismissed.

DISMISSED.

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[Argued January 26; decided February 26, 1894; rehearing denied.]

BUSH v. ABRAHAM.

[S. C. 25 Pac. Rep. 1066.]

1. **PROMISSORY NOTES—WHAT CONSTITUTES PAYMENT.**—A stipulation in a promissory note that it is "to be paid only when payment becomes and is actually made" on a certain other designated note, does not require payment of the other note in money to make the former one due, for payment, though usually understood to mean a satisfaction in money, may be made in something else if the parties so agree.
2. **PROMISSORY NOTE—SUBSTITUTED PAYMENT—RESCISSION OF SALE.**—Defendant sold lands, receiving some cash, and notes for the balance, secured by mortgage on the lands. Thereafter the vendee became insolvent, and in consideration of a reconveyance of the property, and an order on a third person for a certain sum, and to save the expense of foreclosure, the vendor discharged the mortgage, and canceled the notes. *Held* a substituted payment of such notes, and not a rescission of the sale.

APPEAL from Douglas: H. K. HANNA, Judge.

This is an action by A. Bush of Salem against Sol Abraham of Roseburg to recover money on a real estate broker's contract. The complaint alleges, in substance, that at the dates specified therein, defendant became indebted to one F. J. Strayer in the sum of fifteen hundred dollars, for services rendered at the special instance and request of said defendant, in procuring the Glendale Lumber & Manufacturing Company, a private corporation, as purchaser for four thousand acres of land, and the mill and fixtures thereon, and that no part of the same has been paid except the sum of three hundred dollars; that subsequently the defendant, as a further payment thereon, made and delivered his certain promissory note to said Strayer, whereby he promised and agreed to pay him, one year after the date thereof, the sum of one hundred and seventy-five dollars, with interest at six per

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cent per annum, and therein it is provided "That this note is subject to the following conditions: to be paid only when payment becomes due and is actually made on the note given this day by the Glendale Lumber & Manufacturing Company to Sol Abraham, for like term and interest, value received;" that the said note, before it became due, was transferred for a valuable consideration to plaintiff, who is now the owner and holder thereof, of which transfer the defendant was duly notified at the time it was made; that on the second day of May, eighteen hundred and ninety-one, the promissory note described in said condition was fully paid, canceled, and taken up by said company. As the other cause of action herein is identical, a statement of its facts is omitted.

The defendant, after denying the facts alleged in the complaint, set up as a further defense Strayer's misrepresentations as to the solvency of the company, and his reliance thereon, whereby he was induced to deed the said land and mill property to the company, and to accept certain notes therefor which are set out, and for which he took a mortgage on the property as security; the payment to Strayer of the three hundred dollars mentioned in the complaint, etc., and the execution of the notes sued on; the inability of the company, owing to its insolvency, to pay the fifteen-thousand-dollar note when it became due; and the acceptance of the reconveyance of the property to save himself from further loss on account of such insolvency, whereby the transaction was rescinded without having received payment of said purchase-price notes, etc. The reply put in issue the new matter set up as a defense.

The record discloses that the testimony for the plaintiff tended to show that at the time of the purchase of the land, with the mill and fixtures thereon, the company also purchased of the defendant a stock of merchan-

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dise, a store building, a lot of lumber and lath, to the amount of nineteen thousand six hundred and fifty-eight dollars and thirty-eight cents; that there was paid on the same twenty-two thousand six hundred and fifty-eight dollars and thirty-eight cents, and that no part of such sum had been returned to the company; that the several notes executed by the company to the defendant for such property had been taken up and canceled, which notes, so canceled, were admitted in evidence; that the notes forming the basis of the present action had been transferred to plaintiff by the said Strayer, and that he was the owner thereof. The testimony for the defendant tended to show that he had contracted with Strayer, who was a real estate agent, to negotiate a sale of the mill, plant, and land for the sum of sixty thousand dollars; that Strayer sent the company to him as a purchaser; that he sold the premises to it for the above sum, and received in part payment thereof the sum of three thousand dollars, and took a mortgage upon the premises to secure the payment of the remaining fifty-seven thousand dollars; that the defendant afterwards received on account of the purchase price the sum of six thousand dollars by accepting an order on one L. C. Beardsley for that amount, which order had not yet been paid; that these sums were all that he had ever received upon the purchase price of such property, and that he never returned any part thereof; that the defendant learned from Mr. Feller, the manager of the company, that it was insolvent and unable to pay the purchase-price notes as they became due, and that Feller, also, represented to him that he, like nearly all other stockholders, was unable to pay the balance due on his stock, and that the premises had been abandoned, and some of the machinery removed; that when the defendant learned that the company could not pay the balance of said purchase price,

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and that it was insolvent, he took a reconveyance of the premises, and canceled the notes for the remainder of the purchase price. It also appears that a year or so after such sale the company submitted to the defendant in substance the following proposition in writing, which was accepted by him: "That the defendant pay to the order of the company sixteen hundred dollars for sawed lumber, shingles, and timber in the mill yard, and the company reconvey to him all the real and personal property and contracts theretofore conveyed and assigned to it, together with all improvements thereon, free from incumbrance, except the mortgage given by the company for the purchase price; three hundred and sixty dollars of the sixteen hundred dollars so to be paid to be applied in payment of the amount due on the five shares of stock held by defendant in the company, and he in consideration thereof to release and discharge the company from all claims, debts, or demands due him, discharge his mortgage of record, and dismiss all pending actions, suits, or proceedings, at his own expense; the acceptance of such proposition to operate to discharge the company and its stockholders from all obligations, debts, claims, and demands of every nature and description due the defendant, and the company to satisfy and discharge of record all liens against the property of the company as the same appeared of record, with the understanding that the reconveyance of such property was not made for a full and valuable consideration, or any other than the mortgage held by the defendant thereon; and to avoid the trouble and expense incident to a foreclosure and sale of the property, which was not sufficient in value to meet the amount due on such mortgage; and with the further understanding that neither the company, its stockholders, or directors should hold any demand or claim whatever against its agent, L. C. Beardsley, but

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that said Beardsley is indebted to the defendant in the sum of six thousand dollars and interest due thereon. There was a judgment for plaintiff from which defendant appeals.

AFFIRMED.

Mr. Reuben S. Strahan (Messrs. *John W. Whalley, Martin L. Pipes, L. F. Lane, and C. A. Schlbreds* on the brief), for Appellant.

Mr. J. W. Hamilton, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

1. From the foregoing statement of the evidence offered under the pleadings, it will be seen that the main question was, whether there had been payment of the fifteen-thousand-dollar note, by reason whereof the notes upon which the present action is founded would become due and payable. The two notes upon which this action is brought are dated April third, eighteen hundred and ninety, are due one year after date, and each contains the condition that it is "to be paid only when payment becomes due and is actually paid on the note given this date by the Glendale Lumber & Manufacturing Company to Sol Abraham, for a like term and interest, value received." The contention for the defendant is that this note was never paid by the company, within the meaning of the condition to which the notes sued on are subject, and that, therefore, the sums of money specified in such notes never became due and payable. This contention embraces two propositions: (1) that the payment of the fifteen-thousand-dollar note contemplated by such condition is full payment in money of such note; and, (2) that the acceptance by the defendant, in consequence of the insolvency of the company, and to save himself from further loss and expense of a reconveyance of the

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mill property in satisfaction and discharge of the purchase-price notes, and other consideration named, was, according to the terms of the agreement executed by the company and himself, a rescission of the original sale of such mill property, and not a substituted payment, or accord and satisfaction of such purchase-price notes, and hence, that the notes sued on never became due and payable. The condition is that the note is to be paid "only when payment becomes due and is actually made" on the company's note to defendant. Payment, in a restricted sense, is a discharge in money of a sum due. As usually understood, it means the transfer of money from one person, who is the payor, to another, who is the payee, in satisfaction of a debt. In such sense, it would not include an exchange or compromise, or an accord and satisfaction, but would mean the full satisfaction of a debt in money. But in its general sense, payment is the performance of an agreement, or the fulfilment of a promise or obligation, whether it consists in giving or doing. The discharge of a contract or obligation in money or its equivalent, with the assent of the parties, would constitute payment. It may be made in something else than money; in fact, anything that the creditor will accept as payment. It is a mode of extinguishing obligations. To constitute payment therefore, money, or some other valuable thing, must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor receive it for the same purpose: 18 Am. & Eng. Enc. title, Payment, p. 150. And a creditor may accept a part of his debt before the whole is due in satisfaction of the whole, or, if the whole of the money be due and there is an agreement to accept something else, though of less value, in satisfaction of a debt, the agreement in such case would be a bar to a recovery of the residue. But an agreement to substitute any other

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thing in lieu of the original obligation, is void unless mutually carried into execution: *Smith v. Foster*, 5 Or. 44. The note of the company for fifteen thousand dollars being negotiable, was payable in money by its terms and the law applicable to it, but, after such note became due, if the parties so agreed, its payment could have been made in something else than money as an equivalent, or something else than money, though of less value. The company might offer anything as a substitute for the money due on such note, and, if the defendant took it in payment and satisfaction of the same, such an agreement would be valid, and the note satisfied and discharged. As payment is but a mode of extinguishing a debt, it lies with the creditor whether he will accept something different from that which was owing as payment of his debt. So that, if the defendant chose to enter into an agreement with the company to accept something else than money, though of less value, in satisfaction and discharge of the company's notes, it would, when consummated, be a substituted payment, and as effectually extinguish such notes as though payment had been made in money. Such being the case, any agreement to that effect carried into execution by the parties would operate as payment of the note in question, within the purview of the condition to which the notes sued on are subject. We hold, therefore, that the payment contemplated by the condition need not necessarily be in money, but any mode which operated as payment by which such note was satisfied and extinguished, to which the defendant agreed.

2. The other proposition is that the agreement, in the light of the testimony, operated as a rescission of the original sale of the mill property, and not as substituted payment, or in the nature of an accord and satisfaction of the purchase-price notes, among which was the note

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in question. Briefly, the undisputed facts show that the land and mill property were sold and conveyed by the defendant to the company for the consideration stated; that, at the time of the sale, there was paid the sum of three thousand dollars on the purchase price, and several notes given for the residue thereof, which notes were secured by mortgage on the property; that the company went into possession and operated the mill; that about a year thereafter it became unable to meet its obligations, and was, in fact, insolvent, whereupon it made certain written propositions to the defendant, which he accepted, whereby, in consideration of a reconveyance of the property, and to save the trouble and expense of foreclosure and sale, and in further consideration of an order on Beardsley for six thousand dollars, he agreed to discharge his mortgage of record, and to cancel and surrender the purchase-price notes which such mortgage was intended to secure, and to pay sixteen hundred dollars in the manner provided in such agreement. The testimony also shows that this agreement was carried into effect by the parties, and the agreement itself shows, as already stated, the consideration upon which it was founded. The defendant claims that the legal effect of these facts is to show that the transaction was a rescission of the original contract of sale of the mill property,—that the defendant simply took a reconveyance of the property and canceled and surrendered the notes,—and that, as a consequence, there was no payment or satisfaction of the notes in question, without which the notes sued on could not become due and payable, and that the trial court ought to have so charged the jury. The contract for the sale of the land and mill property was executed, and the company was the owner, and in possession of it, but was unable to pay the note in question when it became due. There was no doubt but what the property of the company was more

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than sufficient to secure the payment of said note, but there were other purchase-price notes for large sums, which became payable subsequently, at different dates, and which such property would not be sufficient to satisfy and discharge. As the case stood, the defendant would be compelled to resort to foreclosure proceedings to enforce the payment of the note in question, and the other purchase-price notes as they fell due, while the property was unexhausted; and in view of the insolvency of the company, the delay, the trouble, and expense incident to such proceedings, and to save himself from further loss, an agreement was made and carried into execution whereby the defendant accepted, in satisfaction and discharge of the purchase-price notes, a reconveyance of the mill property, with other considerations named therein. This agreement evidently was intended to effect a complete settlement, but it makes no provision for the refunding of the three thousand dollars paid as part of the purchase price for such property; on the contrary, by the terms of such agreement, it permitted the defendant to retain the same, and the six-thousand-dollar order on Beardsley with the interest due thereon. As the original contract for the sale of the mill property was executed, there was no way to rescind it, except by an agreement that would operate as a rescission. The intention of a rescission is to put the parties in *statu quo*. To rescind a contract is to claim nothing under it. If the purpose of the agreement was limited to the cancellation or discharge of the purchase-price notes, in consideration of a reconveyance of the property, and in some way provided for the disposal of the three thousand dollars, it might be regarded, if this was all, as intended to place the parties in *statu quo*, and that the original contract for the sale of the mill property should be rescinded. But an agreement to accept something in lieu of money

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in satisfaction of debt, when carried into effect, satisfies such debt and discharges all right of action upon it. An overdue demand, whether liquidated or unliquidated, may, by agreement, be discharged by payment of a thing different from that contracted to be paid, although of less pecuniary value; for instance, a thousand pounds by the payment of a pepper corm: *Pinuel's Case*, 5 Coke 117; *Cumber v. Wane*, 1 Strange, 426, 1 Smith's Leading Cases, 601. Although a money demand, liquidated and not doubtful, cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good, no matter what the value: *Bull v. Bull*, 43 Conn. 455. In such case the court will not inquire into the adequacy of the consideration: *Reed v. Bartlett*, 19 Pick. 273; *Fisher v. May*, 2 Bibb (Ky.), 449, 5 Am. Dec. 626. "A claim or demand," Mr. Sutherland says, "may be satisfied by the party liable delivering, paying, or doing, and the claimant accepting, something different from that which was owing or claimed, if they so agree. It is a substituted payment. When such agreement is executed,—carried fully into effect,—the original demand is canceled, satisfied, extinguished. It is thus discharged by what the law denominates accord and satisfaction. It is a discharge of the former obligation or liability by receipt of a new consideration mutually agreed upon": 1 Sutherland on Damages (2d Ed.), § 246. In support of such agreements, if the consideration has some value, the law regards it as sufficient without regard to its extent: *Savage v. Everman*, 70 Pa. St. 315, 10 Am. Rep. 676. The fact that the mill property was of less value than the amount remaining unpaid of the purchase-price notes is not material, if its conveyance was accepted in satisfaction and discharge of such notes. In *Strang v. Holmes*, 7 Cow. 224, it was held that a conveyance of land, given in

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satisfaction of money due on a bond, would operate as a release of the bond, if given and accepted in full satisfaction. SUTHERLAND, J., said: "The sufficiency of the satisfaction cannot be questioned. It was the conveyance of land which, like the gift of a horse, hawk, or robe shall be intended, might be more beneficial to the plaintiff than money, or otherwise he would not have accepted it in satisfaction." In *Eaton v. Lincoln*, 13 Mass. 426, PARKER, C. J., said: "The execution and delivery of the deed by the defendant, in pursuance of the agreement of the creditors, and the acceptance of that deed by their agent, and his sale of property afterwards, was a complete execution of the contract on both sides. These facts would have maintained the issue for the defendant upon a plea of accord and satisfaction." To constitute an accord and satisfaction there must be a satisfaction of the entire debt so as to completely extinguish it.

It would seem, therefore, in view of the conceded facts, that the agreement made and executed by the defendant and the company was not a rescission of the contract of sale, but was in effect a substituted payment. It embraced new and additional considerations, and, when it was carried into effect, operated as payment of the entire debt,—not only the fifteen-thousand-dollar note then due, but the other purchase-price notes which were not due. This being so, the condition of such property, whether it was decreased in value by cutting off timber, or enhanced in value by putting in new machinery, was not material, but collateral. It is the right of a party to accept anything that may be offered in payment and satisfaction of his demand, and when he does so, the transaction is closed, and no inquiry into the condition of the property, or whether the party made or lost by the agreement, can be material, in the absence of fraud. The fact alone that a part of the consideration for the agreement was to pro-

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tect the defendant from further loss, and to avoid the expense of legal proceedings, would be sufficient to support it. All such matter, therefore, in the form of exceptions to different questions, was immaterial and collateral to the issue, and could not affect the right of the broker to his commissions. There is no pretense but what he furnished a purchaser who was acceptable to the defendant, or that the defendant did not make his own terms with such purchaser as to the time of payment. Besides, the record discloses that the defendant Beardsley testified fully on the subject of the condition of the property, although immaterial. We do not think, therefore, that in any view such questions were material, or that their exclusion can be considered as error.

It is claimed that the court erred in not giving an instruction asked by the defendant to the effect that if the jury believed that "at the time the first note for fifteen thousand dollars, made by the company to the defendant became due and payable, the same was not paid by reason of the insolvency of the company, and that, in order to save himself from further loss, the defendant took back the property from the company, the sale of which was negotiated by Strayer, such reconveyance of said property is not payment of the fifteen-thousand-dollar note, and the plaintiff is not entitled to recover. The failure of the company to pay the note of fifteen thousand dollars is a complete bar to plaintiff's recovery in this action." It is insisted by counsel that this instruction embodies a correct statement of the law. He argues that "the writing sued on was payable on an expressed condition, to wit, the payment of this note for fifteen thousand dollars. If this note was not paid, it was the duty of the court to declare as a matter of law that the money mentioned in the writing sued on had not become due and payable." But we think as a matter of law,

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that the agreement which was entered into and carried into effect by the parties, operated as a substituted payment of the note in question, which was payment within the meaning of the condition; and, hence, the notes sued on became due and payable. There was no failure to pay, for when the defendant accepted the company's offer, and the arrangement was completed, it operated as substituted payment. This being so, the defendant was paid the note in question within the meaning of the condition. Nor is there anything in the case of *McPhail v. Buell*, 87 Cal. 115, 25 Pac. 266, cited by counsel, opposed to this result. There the agreement was that the defendant would pay the plaintiff his commissions when the vendees paid to him (the defendant) the sum of twenty thousand dollars on account of the purchase price, and executed to him their notes and mortgages for the balance. The purchasers executed their notes and mortgage, but failed to pay the twenty thousand dollars, and the defendant was compelled to take back the property. The court necessarily held that the failure to pay the money was a complete bar to any claim for commissions.

It is also claimed that the court erred in not giving the following instruction for the defendant: "Plaintiff not having pleaded a waiver of the conditions specified in the contract sued on, he cannot upon the trial rely upon waiver of such condition." The plaintiff is not relying upon a waiver of such condition, but claims that a right of action accrued upon the note for the commission of his assignor when the defendant accepted anything different as payment from that contracted for, by which the note in question was satisfied and extinguished. The facts, as well as the agreement, show that the company did a great deal more than merely surrender the property to the defendant, hence the objection to the second instruction given by the court is not erroneous. It

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is not necessary to prosecute our inquiries further in respect to the other exceptions to the instructions, as our view of the legal effect of the agreement is that it operated as a substituted payment, and not as a rescission of the original contract of sale. Besides, there is no sort of doubt or pretence but what the mill property was more than sufficient in value to pay the full amount of the note in question, and such being the case, if the defendant chose to retain payments made on such property, and accept a reconveyance of it in satisfaction and discharge, not only of such note then due, but of all the purchase-price notes which were payable subsequently at different dates, in order to avoid the delay and expense of foreclosure and sale, certainly such transaction ought to be deemed payment of the note in question, as between the plaintiff and defendant, within the meaning contemplated by the condition, so as to render the notes sued on due and payable, and the plaintiff's right of recovery maintainable. As these views of the law are decisive of the case, it results that the judgment must be affirmed.

AFFIRMED.

[Argued February 6; decided February 23, 1894.]

STATE v. HUNTLEY.

[S. C. 35 Pac. 1084.]

BURGLARY — CONSTRUCTIVE BREAKING — Code, §§ 1758, 1762. — Under an indictment for burglary charging a forcible breaking, it is sufficient to show that the entry was unlawful and without force. Section 1762, Hill's Code, enlarges the scope of section 1758 so that any unlawful entry is a breaking and entering.

APPEAL from Marion: GEO. H. BURNETT, Judge.

The defendant, A. S. Huntley, was convicted of the crime of burglary under an indictment, the charging

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part of which is as follows: "The said A. S. Huntley, on the fifteenth day of November, A.D. eighteen hundred and ninety-two, in the county of Marion, and state of Oregon, then and there being, did then and there unlawfully and feloniously break and enter, in the nighttime, a dwelling-house, in which there was at the time a human being, to wit, Isabelle McKillop, with intent to commit the crime of adultery therein, by then and there forcibly breaking the window and window shutters of such house."

AFFIRMED.

Messrs. B. F. Bonham and W. H. Holmes, for Appellant.

Messrs. Geo. E. Chamberlain, Attorney-General, and *James McCain*, District Attorney, for Respondent.

Opinion by MR. JUSTICE BEAN.

The only assignment of error on this appeal is the giving of the following instructions by the trial court: "To constitute a breaking, within the meaning of the law, it is not necessary that the structure of the dwelling-house should be demolished in any degree. Any unlawful entry into a dwelling-house where there is a human being at the time, with intent to commit a crime therein, would constitute a breaking within the meaning of the statute, although the defendant may have gone in at an open door." And, "if you find from the evidence beyond a reasonable doubt that the defendant entered the dwelling-house named in the indictment, in the nighttime, and against the will of those in charge thereof, with intent to commit the crime of adultery named in the indictment, then the entry was unlawful and the defendant should be convicted however the entry may have been made." These instructions substantially define a

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breaking within the meaning of section 1762 of Hill's Code, which provides: "Every unlawful entry of a dwelling-house, with intent to commit a crime therein, shall be deemed a breaking and entering of said dwelling-house within the meaning of section 1758." But the contention for defendant is that, the state having elected to charge a forcible entry by breaking the windows and window shutters of the house, it was not competent for it to prove a constructive breaking as defined in section 1762; the argument of counsel being that, in order to bring a cause within the provisions of the section last noted, the indictment should not have charged an actual breaking. But we do not so understand the law. Section 1758, under which this defendant was indicted, provides that if any person shall break and enter any dwelling-house in the nighttime, in which there is at the time some human being, with intent to commit a crime therein, etc., he shall be punished as in the section provided; and section 1762 simply defines an unlawful entry or breaking within the meaning of section 1758, or, in other words, provides a rule of evidence by which such breaking may be proven. As was said by the supreme court of Wisconsin, in construing a similar section: "This section merely establishes a rule of evidence whereby the scope of constructive breaking is enlarged so as to take in any unlawful entry of a dwelling-house or other building with intent to commit a felony": *Nicholls v. State*, 68 Wis. 416, 60 Am. Rep. 870, 32 N. W. 543. Under the statutes of this state the wrongful entry of a dwelling-house, with the intent to commit a crime therein, constitutes burglary, and, while it is proper, if not necessary, to charge in the indictment an actual breaking, it is sufficient on the trial to show that the entry was an unlawful one.

The assignment of error based on the refusal of the trial court to grant a new trial has so often and repeat-

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edly been held untenable in this court that it requires no further consideration. It follows from what has been said that the judgment of the court below must be affirmed.

AFFIRMED.

[Decided February 26, 1894.]

OSBORN v. KETCHUM.

[S. C. 35 Pac. Rep. 972.]

1. **SUIT TO REFORM A DEED—PLEADING.**—In a suit to reform a written instrument the complaint should show the original agreement of the parties, should point out clearly wherein the writing differs from the agreement, and that such difference was caused by fraud or mutual mistake, and did not arise from the gross negligence of the plaintiff (*Lewis v. Lewis*, 5 Or. 169, and *Hyland v. Hyland*, 19 Or. 51, cited and approved); but in the absence of a demurrer the complaint will be held sufficient if it alleges that to make the writing conform to the actual intention of the parties it should be amended in certain specified particulars. *Hyland v. Hyland*, 19 Or. 51, cited and approved.
2. **EVIDENCE TO REFORM A DEED.**—Evidence that the parties to a deed to premises conveyed before any survey was made counted the panels in a fence on the east side, and estimated them at one rod to the panel, and allowed two rods to make the line extend to the center of the road, and estimated that the west boundary would intersect the road at a gate near some willows; and that defendant told three witnesses how the length of the east boundary was obtained, and that the west boundary would probably intersect the road near a strawstack, which is shown to be near the willows,—is sufficient to sustain a judgment for the reformation of the deed so as to convey to the center of the road, although the original conveyance was by metes and bounds which left a portion of the land next to the road unconveyed, as shown by a subsequent survey, and the land is still in the hands of the original grantor.

APPEAL from Benton: J. C. FULLERTON, Judge.

This is a suit by Louisa P. Osborn against Ketchum and Holgate to reform a deed. The facts show that the defendant M. B. Ketchum was the owner in fee of that

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portion of the west half of the donation land claim of John Phillips and wife, in Benton County, Oregon, lying south of a county road that runs north, seventy-five degrees west, from the east boundary of said tract, the southeast corner of which is twenty-two chains and sixty-five links south of the center of said county road; that he and the defendant Amanda Ketchum, his wife, on August thirteenth, eighteen hundred and eighty-eight, in consideration of five hundred dollars, duly granted and conveyed to one F. Critcherson the following described premises, to wit: "Beginning at the southeast corner of the west half of the original donation land claim of John Phillips and Rhoda Phillips, his wife, from the United States government, it being claim number sixty (60), notification number six thousand two hundred and fifty-nine, in Benton County, Oregon; running thence westerly along the south line of said claim eighty (80) rods; thence northerly eighty (80) rods; thence easterly with the meanderings of the road eighty (80) rods; thence southerly eighty-one rods to the place of beginning. The intention of this conveyance is to convey forty (40) acres of land out of the southeast corner of the west half of said claim, in as near square shape as can be had." In the spring of eighteen hundred and ninety the defendant M. B. Ketchum had the said premises surveyed by beginning at the southeast corner of said tract, and following the courses and distances given in his deed to Critcherson, and there was found, lying between the said survey and the center of the county road, a tract two chains and forty links wide at the east end, that gradually grew wider as the distance increased toward the west.

Ketchum and wife, intending to convey that portion of said tract lying north of and between said survey and said county road, conveyed the same to their son-in-law, Frederick Root, by quit-claim deed, on July ninth, eigh-

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teen hundred and ninety, for the expressed consideration of one hundred dollars, but designated the beginning at a point eighty-one rods north of the southeast corner of the Rhoda Phillips donation land claim. Said Frederick Root and wife, on August sixteenth, eighteen hundred and ninety, for the expressed consideration of two hundred dollars, conveyed the said tract to the defendant Amanda Ketchum, by a quit-claim deed describing the said premises as in the deed to said Root.

The plaintiff alleges that the property intended to be conveyed by Ketchum to Critcherson was, through mistake, incorrectly described, and that in order to make said deed conform to the actual intention of the parties, it is necessary that the said description should be amended so as to read as follows, to wit: "Beginning at the southeast corner of the west half of the original donation land claim of John Phillips and Rhoda Phillips, his wife, from the United States government, it being claim number sixty (60), notification number six thousand two hundred and forty-nine (6,249), in Benton County, Oregon: running thence westerly along the south line of said claim sixteen (16) chains and thirteen (13) links; thence northerly twenty-six (26) chains and ninety-seven (97) links to the Yaquina Road; thence easterly with the meanderings of the road sixteen (16) chains and seventy (70) links to the division line of said claim; thence southerly along said division line of said claim twenty-two (22) chains and sixty-five (65) links to the place of beginning. The intention of this conveyance is to convey forty (40) acres of land out of the southeast corner of the west half of said claim, extending northerly to the Yaquina Road, in as nearly square shape as can be had"; that immediately after the execution and delivery of the deed from Ketchum to Critcherson the latter went upon and established the boundaries of said land in accord-

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ance with the amended description; that Ketchum was present, and afterwards assisted said Critcherson in the erection of buildings and other valuable improvements on the premises so intended to be conveyed, but outside of the limits included by measurement from the initial point according to the erroneous description. The complaint also shows that said Critcherson is the son of, and acted for, the plaintiff Louisa P. Osborn, who furnished the money to make the purchase of said premises, and for the improvements placed thereon, and that on September fourteenth, eighteen hundred and eighty-nine, she had said premises conveyed to her by the description contained in the deed to her son, and went into possession of the premises intended to be conveyed, with the knowledge and consent of the defendant M. B. Ketchum; that she removed from the state in July, eighteen hundred and ninety, and thereafter the defendants took possession of that portion of the premises lying between the county road and the forty-acre tract, described in the Ketchum deed, and the house thereon, and claim to have some right thereto adverse to the plaintiff, wherefore she prays for a decree correcting the description of said premises, for judgment for the rental value thereof while in the possession of the defendants, and for her costs and disbursements. The defendant Amanda Ketchum, for her separate answer, after denying the allegations of the complaint, alleges the conveyance of such premises to her by said Root and wife; that she is an innocent purchaser for a valuable consideration without notice or knowledge of any claim or equity of the plaintiff. The defendant M. B. Ketchum, for his separate answer, after denying the allegations of the complaint, alleges that since July ninth, eighteen hundred and ninety, he has had no interest in, or claim to, any of the disputed premises. The replies deny the allegations of new matter in

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the separate answers, and the cause being at issue, was referred to F. M. Johnson to take and report the evidence to the court, which having been done, the court found that the equities were with the plaintiff, and decreed a reformation of said deed, rendered a judgment for one hundred and fourteen dollars as the rental value of said premises, and for the costs and disbursements against the the defendants, from which they appeal.

AFFIRMED.

Mr. S. T. Jeffreys (*Mr. E. Holgate* on the brief), for Appellant.

Mr. William Cleland (*Mr. John B. Cleland* on the brief), for Respondent.

Opinion by MR. JUSTICE MOORE.

1. The plaintiff fails to allege that it was Critcherson's intention to purchase, or Ketchum's to sell and convey, the real property mentioned in the amended description, or that there was any contract entered into between the said parties, or that the mistake, if any, in the execution of the deed, was mutual; and the defendants contend that on account of this failure to so allege the complaint does not state facts sufficient to constitute a cause of suit. It is true that in a suit to reform a deed for mutual mistake, the complaint should distinctly set forth the original agreement and understanding of the parties, point out with clearness and precision wherein there was a mistake, and show that it did not arise from gross negligence of the plaintiff: *Lewis v. Lewis*, 5 Or. 169. In the case at bar it is alleged that to make the deed conform to the actual intention of the parties the description should be amended so as to read as set forth in the complaint. The record shows that a general de-

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murrer to the complaint was interposed, which, by consent, was overruled, and the defendants filed their answers. In *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811, it was held, a similar complaint being under consideration, that it was not a case of a defective cause of suit, but of a defective statement of it; that if the case had been presented in this court upon demurrer to the pleading, the demurrer would probably have been sustained, and that, having answered, every reasonable inference should be in favor of the complaint that could be drawn therefrom. If it had been the intention of Critcherson to purchase the real property mentioned in the amended description, and the intention of Ketchum to grant and convey another tract, then the minds of the parties never met or agreed upon the terms of the contract, and hence the mistake, if any, could not have been mutual. But here,—while conceding that the description in the deed is different from that now sought to be established,—the plaintiff distinctly alleges that it was the actual intention of both parties to purchase and convey the property by the description as amended; hence it follows that, in the absence of a demurrer to the complaint, these necessary allegations are reasonably inferred.

2. Section 855 of Hill's Code furnishes the following rule for construing the descriptive parts of a conveyance, when the construction is doubtful, and there are no other sufficient circumstances to determine it: "2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount." The southeast corner of the west half of the donation land claim of John Phillips and wife in Benton County, Oregon, is shown by the record to be a permanent and visible monument, forming the initial point of the premises intended to be conveyed. The

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county road mentioned in one of the calls of the deed is also a permanent and visible monument, but is inconsistent with the line described as the north boundary of the tract conveyed. If there were no other sufficient circumstances to determine the tract intended to be conveyed, under the statutory rule of construction, the premises would be held to include the land described as follows: "Beginning at the initial point and running thence westerly along the south line of said claim eighty rods; thence northerly eighty rods, more or less, to the center of the road; thence easterly with the meanderings of the road eighty rods, or more, to the east line of the west half of said claim; and thence southerly eighty-one rods, more or less, to the place of beginning." The permanent and visible monument at the southeast corner, and the said road on the north of the tract, would thus become paramount to the lines, angles, and even the surface, if it were not for the limitation that "the intention of this conveyance is to convey forty (40) acres of land out of the southeast corner of the west half of said claim, in as near square shape as can be had." The intention of the parties is to be ascertained by considering all the provisions of the deed, and it is the duty of the court to give effect to such intention if practicable: 2 Devlin, Deeds, § 836. Under the rules of construction above given, qualified by said limitation, the amended description must necessarily express the intention of the parties.

F. Critcherson testified that the premises had not been surveyed when he made the contract of purchase with M. B. Ketchum; that a fence containing seventy-nine panels extended from the southeast corner along the east boundary to the county road, which they estimated at one rod to the panel, and added two rods to make the line extend to the center of the road; that he and Ketchum

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estimated that the west boundary would intersect the county road at a gate near some willows; and that the site for the dwelling-house was selected by him at Ketchum's suggestion, in order to procure a supply of water and to be sheltered from the wind. John McGee testified that Ketchum told him they counted the panels of the fence on the east boundary to determine its length, and that he showed the witness a strawstack where he said he thought the west line would intersect the county road. W. H. Dilly testified that Ketchum told him how they obtained the length of the east boundary, and that they added two rods to extend it to the center of the road. A. B. Alexander testified that he hauled the lumber for the dwelling-house erected upon the disputed tract, and that Ketchum told him where to unload; that Ketchum also told him how the lines would run, and said the west boundary would probably be near a strawstack he showed the witness. M. B. Ketchum did not deny that he told McGee, Dilly, and Alexander how the lines would run, or that the west boundary would intersect the county road near said strawstack, but testified that he did not remember of having told them where the lines would probably run; that he might have told the witnesses that the line extended to the road near the strawstack. The evidence also shows that Ketchum assisted Critcherson in building the dwelling-house, and saw the improvements as they were being made; but he testifies that they were placed there by him, and it was agreed that if Critcherson did not purchase the disputed tract, a right of way across it to Critcherson's land should be granted for one dollar. The deed describes the east boundary as being eighty-one rods, which corroborates the testimony of the witnesses that it was ascertained by counting the panels of said fence and adding two rods to extend it to the center of the road. The evidence shows that a strawstack stood

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near a cluster of willows, and that the survey according to the amended description is within about two rods of said strawstack. Without quoting more of the testimony, we think it shows beyond a reasonable doubt that the parties intended to convey by said deed the premises mentioned in the amended description. The record also shows that the defendant Amanda Ketchum accepted a quit-claim deed in which it was sought to convey to her the disputed tract, and she contends that she is an innocent purchaser for a valuable consideration without knowledge or notice of plaintiff's claim thereto. This deed to her fixes the initial point eighty-one rods north of the southeast corner of Rhoda Phillips' donation land claim. The government patent grants the north half of said claim to Rhoda Ann Phillips, and, as the premises in question are situated in the west half thereof, the initial point in the deed to Amanda Ketchum appears, from the description given in the patent, to be more than a half mile distant from the northeast corner of the tract described in the deed to Critcherson, and hence does not embrace any of the land in controversy, and even if her deed had been one of general warranty it could not support her contention. The decree must therefore be affirmed.

AFFIRMED.

[Argued January 29; decided February 26, 1894; rehearing denied.]

COUGILL v. FARMERS' INSURANCE CO.

[S. C. 35 Pac. 975.]

PLEADING FOREIGN JUDGMENT.—A complaint in an action on a foreign judgment, alleging that plaintiff recovered a judgment against defendant in the superior court of another state, no part of which has been paid; that the same remains in force and effect; that on motion of defendant the judgment was vacated, annulled, and set aside by such

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court; that by writ of *certiorari* the entire proceedings were removed to the supreme court where a judgment against defendant and in favor of plaintiff was rendered adjudging that the order of the superior court vacating the judgment be set aside, and that plaintiff recover her costs; but failing to allege any remittitur from the supreme court to the superior court, does not state a cause of action.

APPEAL from Linn: GEO. H. BURNETT, Judge.

Action by Mary Cougill against the Farmers' and Merchants' Insurance Company of Albany, Oregon, on a judgment of the superior court of Jefferson County, Washington. There was a judgment for plaintiff, and defendant appeals.

REVERSED.

Mr. Chas. E. Wolverton (Messrs. J. K. Weatherford and Geo. E. Chamberlain on the brief), for Appellant.

Mr. H. H. Hewitt (Mr. John Trumbull on the brief), for Respondent.

Opinion by MR. JUSTICE BEAN.

This is an appeal from a judgment of the circuit court for Linn County in favor of the plaintiff, rendered in an action on a judgment of a sister state. The only question argued or presented on this appeal, and which has been here raised for the first time in the case, is as to the sufficiency of the complaint. It alleges, in substance, that on the eleventh day of December, eighteen hundred and ninety, in an action then pending in the superior court of Jefferson County, Washington, the plaintiff herein recovered a judgment against the defendant for the sum of fourteen hundred and eighty-one dollars and eighty cents, together with her costs and disbursements, taxed at thirty-six dollars and eighty-five cents; that no part thereof has ever been paid, and that the same remains in force and effect, not satisfied, reversed, or otherwise

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vacated; that on June twenty-seventh, eighteen hundred and ninety-one, the said court, on motion of the defendant, vacated, annulled, and set aside such judgment; that thereafter such proceedings were had that a writ of *certiorari* issued from the supreme court of said state to the judge of the superior court, commanding him to certify up to the supreme court the record of the proceedings in said cause; that subsequently such proceedings were had in the supreme court as that on the ninth day of February, eighteen hundred and ninety-two, a judgment was duly rendered against the defendant, and in favor of the plaintiff, in which it was adjudged that the order of the superior court vacating the judgment be set aside and held for naught, and that plaintiff recover her costs in the supreme court, taxed at sixty-eight dollars and fifty cents.

It is admitted by counsel for defendant that the facts set forth in the complaint would have constituted a cause of action if they had been confined to the existence of the judgment and that it remained in full force and effect. But his contention is that the plaintiff having averred that such judgment had been set aside and vacated by the court in which it was rendered, and that the cause had been taken to the supreme court by the plaintiff on a writ of *certiorari*, it must be presumed, in the absence of any allegation to the contrary, that the cause is still in the supreme court, and that inasmuch as that the court did not affirm the judgment so vacated, or render a judgment in plaintiff's favor, but simply reversed the order of the lower court, (*State v. Sachs*, 3 Wash. 391, 29 Pac. 446,) it therefore does not appear that there is any judgment upon which this action can be maintained. Under the system of procedure in the state of Washington, as we understand it, the supreme court has original jurisdiction to issue a writ of *certiorari* in a

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common-law sense; and as at common law this writ was issued to remove a record from an inferior into a superior court, to be there examined and affirmed or reversed according to law, and, when so removed, it remained in the superior court until remitted by order of that court, though the writ be quashed: *Jaques v. Cesar*, 2 Saund. 100, and note; until such remitter be made, the judgment is not again in the court from which it was certified, and such court has no jurisdiction of the cause: *Welsh v. Brown*, 42 N. J. L. 323; *State v. Adams*, 54 N. J. L. 506, 24 Atl. 482. So that, when the record of the superior court of Jefferson county was removed by *certiorari* to the supreme court it there remained until remanded, and, there being no judgment in the superior court, because of its having been vacated by that court, and the cause never having been remanded, it necessarily follows that the complaint does not show a judgment in favor of plaintiff upon which this action can be maintained.

It was argued by plaintiff's counsel that the complaint states two causes of action—one upon a judgment of the superior court, and the other on a judgment of the supreme court for costs; and, having alleged that the judgment of the superior court still remains in full force and effect, and has not been reversed or annulled, it states a cause of action on that judgment, and the question as to whether a remitter from the supreme court has ever issued is solely a question of proof. This would probably be true if the complaint had not also averred that the judgment had been vacated and set aside by the court in which it was rendered, and hence it shows on its face that there is no judgment of that court, unless the effect of the action of the supreme court in reversing the order setting it aside is to revive the judgment without a remitter, which we do not understand to be the law.

Again it is claimed that only the order purporting to

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vacate the judgment, and not the entire cause, was taken to the supreme court on the *certiorari* proceeding, and therefore the judgment remained unaffected by such proceedings. But under a writ of *certiorari* it was necessary to certify up the whole record, and it appears from the complaint that while the proceedings were instituted for the purpose of testing only a single question, the entire record was removed to the supreme court, and consequently the proceedings in the court below were suspended until the cause was again regularly remitted to that court: *Hunt v Lambertville*, 46 N. J. Law, 59. It follows, therefore, that the complaint does not state facts sufficient to constitute a cause of action, and the judgment of the court below must be reversed and the cause remanded for such further proceedings as may be proper not inconsistent with this opinion.

REVERSED.

LORD, C. J., being interested in the result, took no part in this decision.

[Argued November 27, 1893; decided February 14, 1894.]

CURRIE, RECEIVER, v. BOWMAN.

[S. C. 35 Pac. Rep. 848.]

1. CORPORATIONS—AUTHORITY OF PRESIDENT TO EXECUTE MORTGAGE—RATIFICATION BY DIRECTORS.—The general agent of a corporation is not authorized to mortgage its property as security for a loan, without specific authority from its board of directors, but acquiescence by the board in unauthorized chattel mortgages executed by the president is presumed, where ordinary care and attention to the business would have revealed the fact of their execution, and where, after the mortgages had taken possession of the goods under the mortgages, the board, with full knowledge of the president's act, took no steps to disaffirm his authority or to repudiate the mortgages until the lapse of several months.

25	364
25	20
35*	848
35*	854
25	364
27	101
25	364
31	457
25	364
36	384
25	364
38	42
25	364
41	197
41	204
25	364
47	102
47	220

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2. **FRAUDULENT CONVEYANCES—PARTICIPATION OF GRANTEE IN THE FRAUD—**CODE, § 3053.—Chattel mortgages given to secure *bona fide* debts are not void on the ground that they are given to hinder and delay creditors, although executed by the debtor for that purpose, where the grantee accepts them simply for the purpose of securing his claim, without any connivance with the debtor, although he may be aware that they will necessarily hinder and delay creditors, and that the debtor executed them with that object in view. It is only when the mortgage is both given and received with the intent to hinder and defraud creditors that it is void.
3. **PREFERENCES BY CORPORATIONS.**—So long as a corporation carries on its business with the expectation of its continuance it is not insolvent so as to avoid a preference given to a creditor. *Sabin v. Columbia Fuel Co.* 25 Or. 15, approved and followed.
4. **CHATTEL MORTGAGES ON STOCKS OF GOODS.**—Chattel mortgages on goods constituting stock are valid although permitting the mortgagor to remain in possession where they require him to keep a strict account and pay over the proceeds less the expenses of the business, to the mortgagee, and the conduct of the mortgagee indicates that he intends the terms of the mortgages shall be observed.*
5. **EQUITABLE ASSIGNMENT—EVIDENCE.**—An equitable assignment of promissory notes as collateral security, by a corporation to one of its creditors, is not established, where the notes were never indorsed and the subject of their delivery as collateral is conflicting, and the authority of the person who is claimed to have made such delivery is doubtful.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This is a suit in equity, brought by W. A. Currie, as receiver of the Durand Organ & Piano Company, against B. H. Bowman, to have certain chattel mortgages, alleged to have been executed by the president and secretary of said company in his favor without lawful authority, adjudged to be fraudulent and void as against the company and its creditors; to compel the defendant to account for and pay over the proceeds of sales of the mortgaged

*NOTE.—The effect upon the validity of a mortgage of merchandise of a provision or agreement giving the mortgagor the possession with power of sale, is very exhaustively treated in a note analyzing the multitude of authorities on the subject with the case of *Ephesian v. Ketcher*, 4 Wash. 243, 13 L. R. A. 604.—REPORTER.

Statement of the case.

property to such receiver, and to surrender the residue of such property remaining in his hands unsold, together with certain promissory notes, made by divers persons and payable to the order of the company, which are alleged to be in his possession, and retained by him in fraud of the rights of such company and its creditors, together with contracts for musical instruments sold to divers persons, which are alleged to be fraudulently retained by him, or, in case any of such notes or contracts have been collected in whole or in part by the defendant, to compel him to account for, and pay over the money so collected to such receiver; and to surrender and deliver up three policies of insurance upon the life of Ezra Durand, made payable to such company, which were transferred and delivered to defendant as collateral security for money alleged to have been loaned by him to the said Durand as president of said company, etc.; and for a full and complete accounting of all matters and transactions as set forth in the complaint. The defendant, by his answer, bases his claim of right to the possession of the mortgaged goods, and to the proceeds arising from the sale thereof, as against the said company and its creditors, upon two sets of chattel mortgages, alleged to have been executed in his favor by the president and secretary of the company, with the consent and authority of its board of directors, as security for the company's indebtedness to him, and claims the right to possession of the promissory notes referred to in the complaint by reason of their delivery to him by the president of said company as additional security for such indebtedness. The defendant also claims that the said contracts were by the president turned over to him without indorsement for the consideration of twelve hundred and ten dollars, and that the life insurance policies and notes were transferred to him long prior to the transaction

Argument of counsel.

complained of, as collateral security for the sum of ten thousand dollars loaned to said company.

The trial court, after hearing the evidence, held, in effect, that the company had acquiesced in the execution of said mortgages; that they were not void upon their face, or by reason of any extrinsic facts, as against the creditors of said company; that they constituted a lien upon the stock of goods, and that the defendant was entitled to hold the same, and to retain the moneys arising therefrom, until the indebtedness secured thereby was paid; that the delivery of the said notes to the defendant by the president, under the circumstances, although without indorsement, was sufficient to constitute an equitable assignment of them, and to entitle the defendant to retain the same, and all moneys collected thereon, until the said indebtedness was paid; that the defendant was entitled to retain and hold the contracts received by him from the president, and the moneys collected, or which he may collect, thereon until he realizes the sum of twelve hundred and ten dollars, the amount paid for said contracts, and, that after realizing such amount, he should transfer the remaining contracts to the plaintiff; and that the plaintiff was not entitled to any relief against the defendant.

MODIFIED.

Mr. Albert H. Tunner (Messrs. John H. and Hiram E. Mitchell on the brief), for Appellant.

The Chattel Mortgages.—The chattel mortgages referred to are void as having been made with the intent to hinder, delay, and defraud the creditors of the Durand Organ & Piano Company, under sections 3059 and 3063, volume 2, of Hill's Annotated Laws: *Lyons v. Leahy*, 15 Or. 8; *Kane v. Weigley*, 22 Penn. St. 179; *Brittain v. Crowther*, 54 Fed Rep. 295; Bump on Fraud. Con. 494.

Argument of counsel.

The defendant is not a purchaser for value in respect to the preëxisting indebtedness for which the mortgages were taken, and consequently it is not necessary to fasten upon him notice of the fraudulent intent in order to avoid these instruments, to the extent, at least, of such preëxisting indebtedness: *Vest v. Packwood*, 34 Fed. Rep. 368; *Bank v. Bates*, 120 U. S. 556; *Carey v. White*, 52 N. Y. 138.

The chattel mortgages are void as against the corporation and its creditors for the reason that they were executed by the president and secretary without any authority from the board of directors of the corporation, and because the president or other managing officer of a corporation has no authority by virtue of his office to execute mortgages upon the personal property of the corporation, much less the entire available assets of such corporation: *Luce v. Isthmus R. R.* 6 Or. 125, 25 Am. Rep. 506; *Lynden Mill Co. v. Library Society*, 63 Vt. 581; *Cook on Stock and Stockholders*, 716, and note 4; *In re St. Helens Mill Co.* 3 Sawy. 88.

The facts found by the court are insufficient in law to show any such ratification or acquiescence in these mortgages as would bind or ought to bind the corporation *Lynden Mill Co. v. Library Society*, 63 Vt. 581; *Leggett v. Bank*, 1 N. J. Eq. 541; *Bank v. Drake*, 29 Kan. 311; *Yellow & Co. v. Stevenson*, 5 Nev. 224; *Edwards v. Carson Water Co.* 34 Pac. Rep. 381.

An insolvent corporation, whose business has practically ceased, cannot make a preference in favor of one creditor to the exclusion of other creditors, much less can this be done by the unauthorized act of the managing officer of such insolvent corporation without the knowledge, consent, or concurrence of the board of directors: 2 Morawetz on Corporations, § 803; Taylor on Private Corporations, §§ 34, 654, 655, 668, 759; Wait on Insolvent Corporations, §§ 162, 654; 2 Story's Eq. § 1252;

Argument of counsel.

2 Pomeroy's Eq. § 1046; *Tank Line v. Varnish Co.* 45 Fed. Rep. 7; *White Mfg. Co. v. Pettes Imp. Co.* 30 *Id.* 864; *B. & O. Tel. Co. v. Interstate Tel. Co.* 54 Fed. Rep. 50; *Robins v. Embry*, 1 S. & M. Ch. 207; *Rouse v. Bank*, 46 Ohio St. 493, 15 Am. St. Rep. 644, 5 L. R. A. 378; *Thompson v. Huron Lumber Co.* 4 Wash. 600; *Bank v. Knowles*, 67 Wis. 373; *Haywood v. Lumber Co.* 64 *Id.* 639; *Kankakee Mill Co. v. Kampe*, 38 Mo. App. 229; *Marr v. Bank*, 4 Cold. 471; *Smith v. Putnam*, 61 N. H. 632.

In order that the clause in the mortgages authorizing the sale of goods by the mortgagor and to account to the mortgagee shall render the mortgage valid upon its face, it is necessary that the mortgage should provide that the proceeds of the goods sold should be paid to the mortgagee and applied upon the mortgage debt, while here the proviso is that the money shall be paid to the mortgagor and applied on the debt: *Joseph v. Levy*, 58 Miss. 834; *Brackett v. Harvey*, 91 N. Y. 215; *Pierce on Mortgages of Merchandise*, § 139.

The clause in one of each of the two mortgages dated respectively January ninth and twenty-fifth, eighteen hundred and ninety-two, authorizes the mortgagor to sell upon credit at his discretion, for an unlimited time, upon secured contracts to be turned over to the mortgagee and applied upon the mortgage debt when collected by the mortgagee. This clause we submit renders the mortgage fraudulent and void as to creditors upon its face, and is conclusive evidence of the intent to hinder, delay, and defraud creditors: *Bank v. Westbury*, 16 Hun, 458; *Brackett v. Harvey*, 91 N. Y. 215; *Gardner v. Bank*, 95 Ill. 298; *Bank v. Knowles*, 67 Wis. 373; *Thompson v. Huron Lumber Co.* 4 Wash. 600; *Blennerhassett v. Sherman*, 105 U. S. 100; *Dunham v. Rowell*, 17 N. Y. 9; *Jones v. Syer*, 52 Md. 211.

A chattel mortgage on a stock of goods, wares, and merchandise where the mortgagor is allowed to continue

Argument of counsel.

the business, sell the goods and use the proceeds, is fraudulent and void as against creditors: *Orton v. Orton*, 7 Or. 478, 33 Am. Rep. 717; *Jacobs v. Ervin*, 9 Or. 52; *Bremer v. Fleckenstein*, 9 Or. 266; *Aiken v. Pascall*, 19 Or. 493; *Bank of Ogden v. Davidson*, 18 Or. 571.

Where the mortgagee allows the mortgagor to remain in the possession of the goods, continue to sell the same and use the proceeds, with his knowledge, it is equivalent to an agreement on the part of the mortgagee to that effect, to be implied from that fact, and renders the transaction void as to creditors: *Bremer v. Fleckenstein*, 9 Or. 373; *Putnam v. Osgood*, 52 N. H. 154; *Russel v. Wiene*, 37 N. Y. 591, 47 Am. Dec. 755; *Southard v. Benner*, 72 N. Y. 424; *Putnam v. Osgood*, 51 N. H. 252; *Hangen v. Hachemeister*, 114 N. Y. 566, 11 Am. St. Rep. 69, 5 L. R. A. 137; *Pierce on Mortgages of Merchandise*, § 152.

If the mortgagor is allowed to use any portion of the proceeds of the business it is fatal to the mortgage, even though there be an agreement to account to the mortgagee and pay over the proceeds to him; and this fact may be shown by parol evidence in the face of the mortgage: *Greenbaum v. Wheeler*, 90 Ill. 296; *Dunning v. Mead*, 90 Ill. 376; *Hangen v. Hachemeister*, 114 N. Y. 566.

A chattel mortgage without a clause authorizing the mortgagor to sell, but which the mortgagee permits to be done, is void as to creditors: *Barnet v. Fergus*, 51 Ill. 352, 49 Am. Dec. 547.

If the mortgages are fraudulent and void upon their face, the presumption of law against them is conclusive, and the actual intent of the parties immaterial: *Robinson v. Elliott*, 22 Wall. 513; *Russel v. Winnie*, 37 N. Y. 591-595, 47 Am. Dec. 755; *Steinart v. Duester*, 23 Wis. 136-138; *Blakeslee v. Rossman*, 43 Wis. 116-124.

The fact that the mortgagee obtains possession of the goods under the mortgage, void for the reasons above

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suggested, does not give him any right to the property as against the receiver or the creditors whom he represents: *Blakeslee v. Rossman*, 43 Wis. 116; *Stein v. Munch*, 24 Minn. 390; *Robinson v. Elliott*, 22 Wallace, 513; *Pierce on Mortgages of Merchandise*, § 143; *Gallagher v. Rosenfield*, 47 Minn. 507; *Mandeville v. Avery*, 124 N. Y. 386, 21 Am. St. Rep. 678; *Ferguson v. Hillman*, 55 Wis. 181; *Jones on Chattel Mortgages*, § 351a.

As to the Promissory Notes and Bank Accounts.—The promissory notes belong to the corporation, and it is entitled to their possession. Defendant is not a *bona fide* purchaser for value and without notice so as to claim protection, and consequently he cannot defend against the true owner of the notes: *Lee's Administrator v. Mead*, 1 Metcalf (Ky.), 628, 71 Am. Dec. 494; *Roxborough v. Mesick*, 6 Ohio St. 448, 67 Am. Dec. 346; *Stocker v. MacDonald*, 6 Hill, 93; *Gillett, Receiver, v. Phillips*, 13 N. Y. 114. The notes in question all being made payable to the order of the Durand Organ & Piano Company, the mere unauthorized delivery of the notes by E. Durand to the defendant, without any indorsement and without consideration, would not transfer the title to the notes, either in law or equity: 1 *Daniel on Negotiable Instruments*, § 664a.

The contracts belong to the corporation and the facts found confer no title or right of possession whatever upon the defendant: *Singer Sewing Machine Co. v. Graham*, 8 Or. 1.

Messrs. William W. Thayer and Emmett B. Williams (Messrs. Richard Williams and Chas. H. Carey on the brief), for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

As the plaintiff bases his objections to the findings of law by the court upon the ground that they are not sus-

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tained by the evidence, we shall consider his objections in their order. His first objection is, that the evidence is insufficient in law to show such a ratification or acquiescence in the execution of such mortgages by the president and secretary as would bind the company. The facts show that prior to the second day of December, eighteen hundred and ninety-one, E. Durand, as president of such company, was authorized by resolution of its board of directors "to indorse and transfer, on behalf of the company, any notes, contracts, leases, or other obligations belonging to the company, for the purpose of borrowing money, or selling the same to such persons, and upon such terms, as he shall think best," to enable him to obtain money when needed for use in the business of the company. That about the nineteenth day of December, eighteen hundred and ninety-one, the president, finding it necessary to execute a chattel mortgage upon the stock of goods in the store of the company, to secure a loan from Daly & Son of some nine thousand dollars, or thereabouts, was informed, upon consultation with their attorney, that he must have authority by resolution of the board of directors of the company before he would be authorized to execute such chattel mortgage; that upon receiving such advice he procured the minute-book of the company, and exhibited the same to such attorney with the word "mortgage" and the word "property" interlined in the resolution above stated, which words appeared to be in the same handwriting as the original resolution; and though the interlineation aroused some suspicion in the mind of the attorney, he did not feel justified in questioning its authenticity, and made no further inquiry, whereupon a chattel mortgage was executed by E. Durand, as president of the company, and D. J. Durand, as secretary thereof, under the seal of the corporation, and delivered to Daly & Son as security for

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the sum specified, which mortgage was filed in the office of the county recorder.

It appears that prior to the ninth day of January, eighteen hundred and ninety-two, Daly & Son were pressing the company for payment of their mortgage, and that the president applied to the defendant for the loan of a sufficient sum to pay it; that the company was indebted to the defendant at the time in the sum of ten thousand dollars, and that he held a large number of notes and contracts payable to it as collateral security for the payment of such sum, and also certain policies of insurance upon the life of the president, which policies were made payable to the company, but the evidence shows that many of such notes and contracts were forged, and that many of the contracts had been paid before they were assigned, so that there is no way of ascertaining their probable value; that the defendant agreed with the president to loan the company the sum of eight thousand nine hundred and thirty-eight dollars and seventy-five cents to pay off the Daly & Son mortgages, and the further sum of one thousand four hundred and forty-five dollars to pay certain dishonored checks drawn by the company, provided that the president would secure the payment thereof, and of the said previous indebtedness, which proposition was assented to by him for the company; in pursuance of such agreement, and to secure the defendant in the payment of said sums, the president and secretary of the company executed and delivered, on the nineteenth day of January, eighteen hundred and ninety-two, to the defendant, two chattel mortgages upon the stock of goods, wares, and merchandise, musical instruments, and fixtures of the company, but subsequently it was discovered that a mistake had been made therein, in describing the organs and pianos, and, on the twenty-fifth day of January, eighteen hundred and ninety-two, they executed

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and delivered to the defendant two other chattel mortgages to correct such misdescriptions; that such chattel mortgages were duly filed in the proper office, but the recorder was requested not to give the same out for publication in the daily abstract. The evidence further discloses that there were other mortgages executed by the president and secretary, for the company, to several persons before these mortgages were made and delivered to the defendant.

There is no doubt that the company, under its articles of incorporation, had the authority to execute such chattel mortgages, but there is no authority given to the president to execute them, except such as may be found in the interlined resolution to which reference has been made. All the directors who were present when that resolution was adopted deny that any such power was intended to be conferred on the president, or that anything was said in reference to it. Their evidence also indicates that the president was the guiding spirit of the the company; that their meetings were conducted in a careless manner, and that, from the confidence which they then reposed in him, he could doubtless have obtained the power to make such mortgages if he wanted it. At that time there seemed to be no necessity for such power; it was when he wished to procure a loan from Daly & Son, who required a chattel mortgage, and to see his authority to give it, that he recognized the necessity of such power, and learned that he could not obtain such loan unless he could exhibit his authority from the company to make the required mortgage. It was doubtless to meet the exigence of this occasion that the words to which we have referred were interlined in the resolution. In view of these considerations, and the appearance of the interlined words, we are satisfied that the mortgages given to Daly & Son, and to defendant, were not authorized by

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the board of directors, either by resolution or any other express manner. Nor is there anything in the evidence to indicate that any of the directors, except the president, had any actual notice or knowledge of such chattel mortgages until the twenty-ninth day of January, eighteen hundred and ninety-two, when the defendant took possession of the stock of goods, musical instruments, and fixtures of the company under his chattel mortgages; so that when Durand, as president of the corporation, in its name, and using its corporate seal, undertook to execute these mortgages to the defendant, he did so without authority from the board of directors, and, being thus executed, the company was not bound by them unless it afterward ratifies them.

1. The general agent of a corporation is not authorized to mortgage its property as a security for a loan, without specific authority from the board of directors: *Luse v. Isthmus Ry. Co.* 6 Or. 125, 25 Am. Rep. 506. This being so, the inquiry now is whether the facts in evidence are sufficient to show such ratification or acquiescence in the unauthorized acts of the president in the execution of these mortgages as would bind the company. It appears that for several years prior to the transactions mentioned, E. Durand was the general manager of the corporation; that its business was carried on and conducted by him as president and manager, and that the board of directors were careless and negligent in not knowing, and keeping themselves informed as to, the condition of the business, and the manner in which Durand, as president, was conducting the same and dealing with its property. It further appears that the directors had access to the minute-book in which the interlined resolution authorizing the president to mortgage the property, was recorded, and, by ordinary attention to the duties which devolved upon them, could have discovered such

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interlineations; yet such resolution was allowed to remain upon the record in that form, unknown to them, until the defendant took possession of the property under his chattel mortgages. They paid little or no attention to the management of the company's business; nor do they seem to have known anything about its financial condition, except that it was in debt, and that its president was borrowing money, and making provision in his own way for the payment of its obligations. When the lamentable condition of the business of the company is considered, as a result of Durand's mismanagement, and the manner in which he conducted it, the directors' ignorance or want of knowledge of its affairs can find its only justification, if at all, in the implicit confidence which they reposed in him and his management. Other mortgages, prior to those mentioned, had been given by him on the property of the company in the regular course of its business, but without any express authority therefor. Nor is this all. When the defendant took possession of the stock of goods included in the chattel mortgages, and proceeded, with their knowledge, to sell off and dispose of it, they took no steps to prevent the same, or to disaffirm the execution of such mortgages; nor did they make any effort to refund or repay the moneys mentioned, which had been used in the business of the company, or do anything in reference thereto until several months thereafter, when the present suit was instituted. A few days before the defendant took possession of the stock of goods, the president of the company absconded, and went to parts unknown, and so remains, and a few days thereafter another director left the state. In view of the policy of the board of directors of the company, under the circumstances, when they had full knowledge of the unauthorized act of its president, and took no steps to disaffirm his authority to execute such mortgages on

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behalf of the company, we think they have acquiesced in the execution of said mortgages, and that the same have become binding upon the company, as though authority was originally given to execute them.

"The law is well settled that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority makes that act his own; and the maxim which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent": *Kelsey v. National Bank of Crawford Co.* 69 Pa. St. 429. Mr. Morawetz says: "Acquiescence is good evidence of consent; and if the agents of a corporation who have power to ratify an unauthorized act performed by another agent manifest no dissent after having received full notice, a ratification of the act may often be presumed": *Morawetz on Private Corporations*, § 633. And Mr. Beach says: "Ratification by directors may be made by accepting the report of a committee stating the facts, or by the acquiescence of a majority of the directors, with full knowledge of the contract so ratified. Ratification may be also presumed from a failure to exercise promptly the right of disaffirmance": 1 *Beach on Private Corporations*, § 195. In *Sherman v. Fitch*, 98 Mass. 59, where an action was brought upon a mortgage executed by the president of the corporation without formal authority the court says: "The remaining consideration relates to the authority of Sampson to execute the mortgage in behalf of the corporation. It is not necessary that the authority should be given by a formal vote; such an act by the president and general manager of the business of the corporation, with the knowledge and consent of the directors, or with their subsequent and long continued acquiescence, may properly be regarded

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as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals.”

2. The next objection is that the chattel mortgages were fraudulent and void as against creditors. The defendant contends that they are shown, by the evidence and circumstances attending the transaction, to have been made and executed on the part of the president of the company with the intent to hinder, delay, and defraud its creditors, and that the defendant actively participated in such intent. This contention proceeds upon the idea that the object of Durand, as president, in making such mortgages, was to put the property under cover, so that he could carry on the business and hold the other creditors off for an indefinite period, and that the defendant, having knowledge of such purpose, aided him in its execution. At the time the mortgages were taken the company was actively engaged in business, and had been for several years. It is probable, in the light of subsequent events, that it never was solvent, and its collapse was only a question of time. Now that the character of its president stands revealed, he seems to have been an adventurer, adroit and unscrupulous, full of confidence in himself and the successful accomplishment of his business plans, which, in some instances, involved actual criminality; yet when these transactions took place he had been president of the company for several years, and under his management it had done a large business in selling goods and borrowing money, which indicated that it was generally regarded by the business community as solvent, and that its manager possessed their confidence. He had borrowed large sums of the defendant at different times, and the circumstances under which the mortgages in question were made and taken has already been

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detailed. There is no doubt that the defendant was anxious to make himself secure; the previous indebtedness of the company to him, and the sum to be advanced to pay Daly & Son, were large, and in all his prior transactions with the president he had required collateral security for loans. There was, therefore, nothing out of the usual order of affairs in his taking security, and, as the Daly & Son indebtedness was secured by a mortgage, it could hardly be expected that he should relinquish such security, or do otherwise than he did in the exercise of ordinary business prudence. It may be true that the fact of the mortgage covering the entire property suggested to his mind that the company was in failing circumstances, and, even if it did, it would be nothing more than ordinary business caution for him to secure himself against loss; and, if in so doing, he acted in good faith, the transaction was not fraudulent. It is only when the mortgage is given and received with the intent to hinder and defraud creditors that it is void, and not when it is taken by the mortgagee for the honest purpose of securing a valid claim or indebtedness. It may be that Durand knew the business of the company must collapse sooner or later; yet his conduct indicates that when these transactions occurred he thought he would be able to meet the obligations of the company to the other creditors, and carry on the business for some time at least. But, however that may be, even if we assume that his object in making the mortgages was to hold off his creditors, unless the defendant participated in that purpose or connived at his design to hinder and delay them, such mortgage would not be fraudulent or void.

The statute, section 3053, Hill's Code, avoids the mortgage or conveyance when it is made and taken by the parties to it with the intent to hinder and delay the creditors of the mortgagor. It is the purpose of the convey-

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ance to which the statute has reference, and hence it is the intent or purpose of the parties in giving and receiving the mortgage which constitutes the test of its validity. It is not enough that the claim or debt secured by the mortgage may be valid, although that circumstance is an important factor in the transaction, if such mortgage was made and taken by the parties with intent to hinder or delay creditors. Now, although the defendant may have thought that the company was in failing circumstances, and that its president sought by the mortgages to hold off its creditors until its financial difficulties could be tidied over, yet if the mortgage was valid on its face, and accepted by the defendant without any secret trust, or any understanding in furtherance of such object, or connivance or participation in such fraudulent intent, but for the purpose of securing the payment of the debt, such mortgages are not fraudulent or void. The mere fact that hindrance and delay would necessarily result from the execution of such mortgages would not render them fraudulent. Every mortgage upon the property of the debtor necessarily tends to hinder and delay creditors, and especially so when it covers the entire property of the mortgagor, as in that case its effect would be to deprive other creditors of all means of obtaining satisfaction of their equally meritorious claims; yet, if the mortgage was received by the creditor in good faith, to secure the payment of a valid debt, the delay and hindrance necessarily arising therefrom is not a fraudulent hindrance in the sense of the law. This results from the fact that it is lawful for a debtor to prefer one creditor to another, or to secure one and leave another unsecured; notwithstanding his motive may be to prevent his other creditors from collecting their demands, the delay or hindrance occasioned thereby to such creditors is not within any legal prohibition. The reason is that where

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there is a valid debt and a real transfer, there is no ground upon which to predicate collusion or fraud.

To avoid a mortgage or other conveyance as fraudulent and void, there must be a real design on the part of the mortgagor, in which the mortgagee participated, to withdraw his property from the claims of his creditors. The real question there, is whether the president of the company made the mortgages in question with intent to defraud, delay, or hinder its creditors, and whether the defendant accepted them with knowledge of that design, and with intent to promote its accomplishment. There was some evidence tending to show that the president of the company thought, or expected, that if he could procure a loan from the defendant whereby he would be able to liquidate the mortgages to Daly & Son, who were demanding payment, and at the same time secure the defendant by a mortgage upon the stock of goods, it would enable him to tide the company over its difficulties, and hold off its other creditors until he could make some other arrangements for paying them, which he contemplated. If Durand had in mind, beyond securing the indebtedness to defendant, the purpose to use the mortgages as a cover to withdraw the mortgaged property temporarily out of the reach of the company's creditors, he could not make such purpose effective without consent and coöperation of the defendant, and there are no facts or circumstances tending to show that the defendant connived at or participated in such purpose, or that the mortgages were taken with the secret understanding that they should be used as a means to hold off or baffle other creditors. The anxiety of the defendant to secure his demand, and the money which he advanced to pay off the Daly & Son mortgages, shows that in the race of diligence he was vigilant and attentive to his own interests, but there are no facts or circumstances connected

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with the transaction which satisfy us that the defendant connived at, or participated in, any fraudulent design that Durand may possibly have contemplated. If the mortgages appropriated only a fair amount of property as security for the indebtedness, although it was all the property of the company, the fact that the defendant may have known that Durand in making such mortgages had the design to hinder and delay other creditors, would not vitiate them, if the defendant did not accept them with the intent to aid him in such design but solely to secure the payment of his claim against the company. Mr. Bump says a creditor "does not violate any principle of the statute when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims, and though he may be aware of the intent of the debtor to defeat the collection of them. Fraud, in its legal sense, cannot be predicated of such a transaction. Wherever there is a true debt, and a real transfer for an adequate consideration, there is no collusion": Bump on Fraudulent Conveyances (2d Ed.), p. 187.

3. A debtor has a right to secure a creditor, and, if he does so by giving a mortgage, it is what the law admits to be rightful, although the effect will be to hinder other creditors, and he so intends; yet, if such mortgage is accepted in good faith, it is not a fraudulent hindrance, because the debtor has not disposed of his property in a way to prevent its application to the satisfaction of his *bona fide* debts: *Sabin v. Columbia Fuel Co. ante*, p. 15, 34 Pac. 694. To hold otherwise would be to establish as a rule what BLACK, C. J., says "requires a man to take care of his neighbor's interest at the expense of his own," and which he thinks "is utterly impracticable in the present state of human society": *Cowanhook v. Hart*, 21

Pa. St. 501, 60 Am. Dec. 57. As the company was carrying on its business with the expectation of its continuance at the time when these transactions occurred, and was what is sometimes called a "going concern," we have not deemed it necessary to consider the question as to the right of an insolvent corporation to prefer creditors.

4. The mortgages contain no power of sale in the mortgagor for his own benefit, nor is there anything therein which the court can say is unlawful. The mortgagor is allowed to remain in possession of the goods, but he is required to keep a strict account, and pay over the proceeds, less the expenses of the business, to the defendant; and it is perfectly evident that by honest conduct under these mortgages there could be no fraudulent result. The facts show that the president of the company did account for and pay over the proceeds of the stock some time between the ninth and twenty-ninth of January, eighteen hundred and ninety-two, and furnished written statements of sales made for cash, and of some few small goods that were sold on credit, and these latter sales being contrary to the terms of the mortgages, the defendant became dissatisfied, and on the last named date took possession of the stock of goods and proceeded to sell and dispose of it. The record discloses the amount of sales made by him, and the stock remaining on hand and under his control when the present suit was commenced. The fact that the sales of a few small goods were on credit and the failure to render proper accounts, thereby violating the terms of the mortgage, gave rise to the inference that the president was allowed to remain in possession of the goods, and to use the proceeds for his own benefit; but the evidence shows that Durand remained in possession only about twenty days, and that, as soon as the defendant discovered that the accounts were not kept as they should be, he took possession of

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the stock. Under these circumstances we do not think that the sales of these small goods, which brought but a trifling amount, ought to operate to render the mortgages void. The defendant was vigilant, and his conduct indicated that he intended that the terms of the mortgages should be strictly observed, and that any departure therefrom would not be tolerated. We think, therefore, that the mortgages were valid, and constitute a lien on the property, and that the defendant is entitled to hold and retain the same and the moneys arising therefrom until the company's indebtedness to him is fully paid.

5. It is further contended that the company is entitled to the possession of certain promissory notes, which it is claimed that Durand as president delivered to the defendant as additional security for such mortgage indebtedness. The facts show that the notes were payable to the company, and were not indorsed to the defendant, but were simply handed over to him by verbal delivery. The evidence is conflicting in regard to the circumstances under which such delivery was made. The defendant testifies, in effect, that after he took possession of the stock he demanded additional security, and that the president of the company handed those notes to him with the remark, "Here; I will turn these notes over to you as additional security," and that he said "All right," and took the notes. Mr. Anderson, who was placed in charge by the defendant, testified that the notes were turned over to him by the president to assist or to be used in paying running expenses, and that while the notes were in his charge, and in the safe, Durand asked for them, and upon their delivery to him he was about to deliver some of them, amounting in face value to about fifteen hundred dollars to another creditor, when he (Anderson) protested, and telephoned the defendant

what Durand proposed to do, whereupon the defendant, soon after, came over and took the notes, against his will and understanding, and carried them off. The president had no authority other than that derived from the resolution, to which reference has been made, to deliver such notes as collateral security. It is extremely doubtful if such resolution authorized him to use such notes for that purpose, and, in view of the fact of conflict in the evidence whether or not they were ever delivered to him as additional security for the indebtedness, we do not think there was such a delivery as would constitute an equitable assignment of such notes, or entitle the defendant to retain the same, or the moneys collected thereon, until his indebtedness should be paid, or at all. The facts show that he has collected upon such notes the sum of three thousand one hundred and forty-two dollars and fifty-five cents, and that he has the same in his possession or under his control. The finding of the trial court, therefore, in respect to such notes, is set aside, and the defendant is required to turn over the above mentioned sum as collected on such notes to the receiver for the company, and also to deliver to him the notes remaining in his hands and unpaid in whole or in part.

The next objection relates to certain contracts which were delivered to William A. Currie, the receiver of the company, and plaintiff in this suit, by the president by way of a pledge for a debt owing to him, or money advanced for the company. The facts show that defendant paid Currie one thousand two hundred and ten dollars for such contracts, which secured the possession of the same, and that Currie credited the company with the amount of this money when so paid. Upon these contracts the defendant has collected in cash the sum of one thousand one hundred and thirty-six dollars and forty-six cents and those uncollected are still in his possession.

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As the facts show that the money received from the defendant in payment for these contracts was applied to the discharge of the company's obligations incurred for freight, the trial court held that the defendant was entitled to hold such contract and all money collected thereon, or which he may receive, until he realizes the sum of one thousand two hundred and ten dollars, the amount paid for them, and that after realizing said amount he should transfer said contracts to the plaintiff. Without further detail, we think, in view of all the facts and the circumstances surrounding them, that this finding is correct and should be sustained. From these considerations it follows that the decree must be modified so as to conform to the views herein expressed, and it is so ordered, and that the plaintiff recover his costs and disbursements in this court.

MODIFIED.

[Argued Dec. 26, 1893; decided Feb. 14, 1894; rehearing denied.]

ROSENAU v. SYRING.

[S. C. 35 Pac. Rep. 845.]

1. **CONVERSION BY COTENANT—TROVER.**—Where one tenant in common claims the exclusive ownership, and applies the joint property to his own exclusive use, there is such a conversion as will enable his cotenant to bring trover against him.*
2. **TROVER—DEMAND BEFORE SUIT—PLEADING TITLE IN DEFENDANT.**—Where defendant denies plaintiff's title, and pleads ownership and right to the possession in himself or another, he cannot defeat recovery on the ground that plaintiff did not allege and prove demand before suit.
3. **TROVER BY TENANT AGAINST LANDLORD.**—Where, during the term of a lease, the landlord enters and takes possession of the premises, and converts to his own use removable trade fixtures erected by the tenant

*NOTE.—For liability of cotenant to action of trover, see extensive note to *Waller v. Bowling* (N. C.), 12 L. R. A. 261, and the note to *Bolling v. Kirby* (Ala.), 24 Am. St. Rep. beginning at p. 816.—REPORTER.

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for use in his business, the tenant may bring trover against the landlord unless he has surrendered the premises and abandoned the term.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

This is an action by Minnie Rosenau against Albert and Amelia Syring to recover damages for the unlawful conversion of personal property. The complaint, in substance, avers, that on December second, eighteen hundred and ninety-two, Gustav Lichthorn and Anna Lichthorn were the owners of and in possession of certain personal property, which, for the purposes of this case, may be segregated and considered in three parts: First, sundry small articles of the aggregate value of one hundred and thirty-five dollars; second, twenty sacks of flour of the value of twenty-three dollars; and, third, a bake oven of the value of three hundred and fifty dollars; that on the day named the defendants wrongfully and unlawfully took and carried away said property, and converted the same to their own use; and that prior to the commencement of this action the Lichthorns assigned and transferred to the plaintiff their right, title, and interest in and to the property, and their claim against the defendants for its conversion. The defendants answered jointly, denying the allegations of the complaint, and, among other defenses, alleged, in substance, that at all the times mentioned in the complaint the property therein described, except the bake oven and flour, belonged to Gustav Lichthorn alone, and was, on December first, eighteen hundred and ninety-two, seized under a writ of attachment issued in an action brought by the defendant Amelia Syring against him to recover the sum of fifty-eight dollars, and was afterwards sold to satisfy the judgment recovered in the action; that the twenty sacks of flour belonged to, and was the property of, Kratz & Kernan, and was by them replevined from the sheriff

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after the levy of the execution and before the sale; that the bake oven referred to was constructed by Gustav Lichthorn upon the property of defendant Amelia Syring, which he occupied as her tenant, and that the same is an irremovable fixture, the ownership and title to which goes with the land; and that about December first, eighteen hundred and ninety-two, the Lichthorns surrendered possession of the premises and abandoned whatever interest they had in the oven to the landlord. The reply put in issue the new matter alleged in the answer. Upon the issues thus joined the cause was tried, and a verdict rendered in favor of the plaintiff for the sum of two hundred dollars, and from the judgment entered thereon this appeal is taken.

AFFIRMED.

Mr. Theodore Geisler, for Appellants.

Mr. W. L. Nutting, for Respondent.

Opinion by MR. JUSTICE BEAN.

1. The evidence tended to show that plaintiff's assignors, who were conducting a bakery on property leased of the defendants, were the joint owners of the property in controversy on the first day of December, eighteen hundred and ninety-two, when Gustav Lichthorn's interest therein,—except the bake oven,—was duly attached in an action brought against him by the defendant Amelia Syring, and afterwards sold to satisfy a judgment recovered therein, and purchased by the defendants. Upon these facts the contention for the defendants is that the plaintiff cannot in this action recover for the alleged conversion of Anna Lichthorn's interest in the property, because the defendants, by their purchase at the execution sale, became the owners of Gustav Lichthorn's interest, and therefore tenants in common, or

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joint owners, with her. The general rule is that one tenant in common of chattels cannot maintain an action of trover against his cotenant, because the right of possession lies at the foundation of the action, and the one is as much entitled to the possession as the other. But where one tenant in common, denying the right and title of his cotenant, and claiming the exclusive ownership in himself, applies the joint property to his own exclusive use, it will amount to a conversion, and enable his cotenant to support trover against him therefor: Cooley on Torts, § 455; *Agnew v. Johnson*, 17 Pa. St. 373, 55 Am. Dec. 565; *Winner v. Penniman*, 35 Md. 163, 6 Am. Rep. 385; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Grove v. Wise*, 39 Mich. 161. Now, in this case, the defendants, by their answer, and all through the trial denied and refused to recognize or admit Mrs. Lichthorn's interest in the property, but asserted exclusive title and ownership in themselves, which would amount to a conversion, and enable plaintiff to recover the value of Mrs. Lichthorn's interest in this action.

2. It is next contended that the property came rightfully into the possession of the defendants by virtue of the attachment and execution proceedings, and no action for its conversion can be maintained without allegation and proof of demand and refusal to deliver. The undoubted general rule is that when property belonging to one is rightfully in the possession of another, no action for its conversion can be maintained until after a demand and refusal. The reason for this rule is the presumption that one in possession of property belonging to another will, upon demand, surrender it to the true owner, and hence ought not to be harrassed by an action to recover its possession until after an opportunity to do so. But where the defendant, in his answer, denies plaintiff's title, and pleads ownership and right to the possession in

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himself, or another, he cannot defeat a recovery on the pretence that he would have surrendered the property if demand had been made. By such an answer he admits the detention, and justifies it by claiming title and right of possession in himself, and in such case it is not necessary for plaintiff to allege and prove demand previous to bringing the action: *Cobbey on Replevin*, § 448; *Lewis v. Smart*, 67 Me. 206; *Raper v. Harrison*, 37 Kan. 243.

3. The next assignment of error is in refusing to instruct the jury that the bake oven could not be considered by them in assessing damages, because it is so attached as to become part of the realty, and therefore not the proper subject of an action in replevin or trover; but in this we think there was no error. On July eighth, eighteen hundred and eighty-two, the Lichthorns leased of the defendants, for a term of ten years, certain premises in Albina, for use as a bakery, and there was evidence tending to show that the oven in question, which was built of brick and rested on a platform supported by posts set on the ground, was a removable trade fixture erected by them for the purpose of the business in which they were engaged, and which they had a right to sever and remove during their term. Before the expiration of the term the landlord entered and took possession of the demised premises, and applied and converted the oven to his own use, and the weight of authority seems to be that the tenant may maintain trover against the landlord under such circumstances, unless he has surrendered the premises and abandoned the term, which was one of the issues made by the pleadings in this case, and was for the determination of the jury: 2 *Woodfall on Landlord and Tenant*, 620, and note; *Ex parte Hemenway*, 2 Lowell, 496; *Finney v. Watkins*, 13 Mo. 291; *Watts v. Lehman*, 107 Pa. St. 106; *Vilas v. Mason*, 25 Wis. 310. The court could not, therefore, have properly instructed the jury, as a

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matter of law, that the oven was not to be considered by them in estimating plaintiff's damages. There were several other questions suggested at the argument, but the consideration given them has disclosed that they are without merit. The judgment of the court below is therefore affirmed.

AFFIRMED.

[Argued February 1; decided February 19, 1894; rehearing denied.]

STATE v. HANSEN.

[S. C. 35 Pac. 976.]

1. **INSANITY AS A DEFENSE TO MURDER—CODE, § 706—EVIDENCE OF SUBSEQUENT CONDUCT.**—On the defense of insanity superinduced by alcoholism, the sheriff's testimony that on the day after the homicide accused had no symptoms of delirium tremens, is admissible, in the trial court's discretion, even if the sheriff be not so intimate an acquaintance as to make his opinion, with reason given, competent, under Hill's Code, § 706, since it is within the discretion of the trial court to admit evidence of the acts, conduct, and habits of the accused at such subsequent time as would fairly justify any inference of insanity relating back to the time of the alleged offense.
2. **WITNESS—CONTRADICTORY STATEMENTS.**—Accused having, before consulting counsel, formally confessed that he struck his wife the fatal blow after she had quarreled with and thrown a rock at him, and a witness having sworn that accused told him that he struck the blow without provocation, on a sudden impulse, which he could not explain, there was no error in admitting testimony that such statement was made after accused had consulted with his counsel, there having been no effort made to argue that the defense of insanity was devised by counsel at such visit, or to show what occurred at the visit at all.
3. **EVIDENCE TO CORROBORATE CONFESSION.**—On a trial for murder of defendant's wife, evidence tending to prove that deceased kept her money in the bureau drawer and carried the key in her pocket; that, when the body was discovered the key was not there, but was found in the bureau drawer; that defendant just before the alleged homicide had no money; and that when the sheriff arrested him the next day after the homicide there was found upon his person over fifty dollars, is admissible to show his connection with the commission of the crime, the motive for its perpetration, and as tending to corroborate a confession made by him that he took the key from her pocket and opened the bureau drawer.

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4. **ENTIRE INSTRUCTIONS—JURY TRIAL.**—On a trial for murder in which the defense of insanity is set up, an instruction that the burden is upon the party claiming insanity as a defense to make out such defense beyond a reasonable doubt, and that if the jury have "any doubt" as to whether the defendant was sane or insane at the time of the commission of the crime the state is entitled to the benefit of the doubt,—is not reversible error, as it will be presumed that the word "any," used in the connection in which it was, referred to any reasonable doubt; and further because the jury could not have been misled in view of the other instructions given. The rule is the same in criminal as in civil cases, that instructions must be considered in their entirety, and a single instruction that might be subject to criticism, when not misleading, will not justify a reversal, if properly limited by correct instructions.
5. **INTENT AS A TEST OF CRIMINAL LIABILITY—INTOXICATION—HILL'S CODE, § 1358.**—Where the existence of a particular motive, purpose, or intent is necessary to constitute a particular species or degree of crime, and intoxication is an element of the defense, (Hill's Code, § 1358,) the intent is the test of criminal liability, regardless of the motive or purpose.
6. **HOMICIDE—INSTRUCTION TO JURY.**—An instruction on a trial for murder, that if deliberation, premeditation, malice, "or" cool blood existed, and the killing is the result of "them," the fact that defendant was intoxicated when he committed the crime is no defense, is not reversible error, notwithstanding the use of the word "or," as by the use of the word "them" it follows that all of the elements described were necessary to overcome the fact of intoxication if it existed.
7. **HOMICIDE—CORROBORATIVE EVIDENCE OF DELIBERATION.**—Where there is evidence that before the crime defendant had no money, that when he was arrested the day following he had over fifty dollars, that deceased kept her money in a bureau drawer and carried the key in her pocket, and that when the body was discovered the key was not in it, and that defendant opened some of the drawers of the bureau before he notified any one of her death, it is a question of fact for the jury whether defendant had deliberated and premeditated upon the commission of the act.
8. **INSANITY AS A DEFENSE TO CRIME—CODE, § 1358.**—Under Hill's Code, § 1358, requiring insanity, as a defense, to be proved beyond a reasonable doubt, the jury's finding on that question cannot be disturbed.
9. **IDEM.**—Where a defense is insanity, the burden of proof always remains with the defendant: Code, § 1358.

APPEAL from Clatsop: THOS. A. McBRIDE, Judge.

Opinion of the court—MOORE, J.

The defendant was indicted, tried, and convicted of the crime of murder in the first degree, by striking and killing his wife, Caroline Hansen, in Clatsop County, and a motion for a new trial having been overruled by the court, the defendant was sentenced to be hanged. From this judgment he appeals, and assigns as error the admission of certain evidence and the giving and refusal of certain instructions. We shall consider the assignments in the order in which his counsel presents them.

AFFIRMED.

Mr. Charles W. Fulton, for Appellant.

Messrs. Geo. E. Chamberlain, Attorney-General, *W. N. Barrett*, District Attorney, and *F. D. Winton*, for the State.

Opinion by MR. JUSTICE MOORE.

1. He contends that the court erred in admitting in evidence the testimony of H. A. Smith, sheriff of said county. The defense interposed was insanity superinduced by the excessive use of alcoholic liquors, to support which evidence was introduced tending to show that for about eleven years prior to the alleged homicide the defendant had been in the habit of becoming intoxicated whenever he could obtain liquor; that upon returning to his home after a drunken spree he was restless and could not sleep nor work continuously at anything, but changed from one thing to another, and that these nervous symptoms continued for about eight or ten days after each of his periodical sprees; that when he had been drinking for some time he talked to himself as if he imagined there was a little man in his boat to aid him in picking up his net; that at times, when under the influence of liquor, he laughed, danced, and cried alternately; that during these sprees, or while

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getting sober, he was moved to tears by the mention of his wife's name in his presence; that deceased was killed Wednesday, July twenty-sixth, eighteen hundred and ninety-three, and that for some time prior to the preceding Sunday the defendant had been in Astoria, had purchased while there two gallons of whisky and was so much under its influence on that Sunday that he remained in his boat alone without any apparent purpose and talked to himself; that on the evening of that day his wife had him brought home, where he remained until Tuesday night, when he went out fishing on the Columbia River; that on the following morning he visited a neighboring fisherman to whom he complained of being sick and took three drinks of whisky, and partook of some bread and coffee, but when offered beefsteak he said he could not eat it; that after partaking of these refreshments he went home and retired to rest; that about five o'clock that evening he informed a person working near his house that some one had killed his wife. Upon the defendant's symptoms, thus described, hypothetical questions were asked medical experts, whose answers thereto tended to show that at the time of the alleged homicide defendant was insane. To rebut this evidence, the state, over the objection of defendant's counsel, was permitted to show by the testimony of H. A. Smith, the said sheriff who took the defendant into his custody the day after the tragedy, that in his opinion the defendant was perfectly sane on the day he was arrested. The objection to this evidence was made upon the ground that it did not appear that the witness was an intimate acquaintance of the defendant. The bill of exceptions shows that the witness had known the defendant for five or six years; that he saw him every month or so when he came to town, and that said witness made the following answers to questions propounded to him: "Q.—

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Were you intimately acquainted with him? A.—I was for about two years; not very intimately, but at the time I belonged to the Fisherman's Union." "Q.—He was in your office quite frequently during those two years? A.—Yes, sir." "Q.—Were you up to his place visiting? A.—Not until this time." "Q.—How frequently during these two years did you see him? A.—I didn't pay any attention; it might be a month or so, or a couple of weeks." "Q.—Do you know him well? A.—I know him pretty well." Upon these answers to the foregoing questions the court permitted him to express an opinion upon the mental condition of the defendant. He also testified that he took the defendant to jail about eight o'clock in the evening, and saw him about three times during the night after his arrest, and that he did not notice any tremor of his muscles.

Section 706, Hill's Code, provides that evidence may be given on the trial of the following facts: "10. * * * the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." It is not every acquaintance that is competent to give an opinion in such cases, but it must be one who has close social relations with the person whose mental condition is the subject of inquiry. There are, however, degrees of intimacy, and it is within the discretion of the trial court to say when the witness has shown himself competent and qualified to express an opinion upon the subject, and this discretion, when exercised, will not be reviewed except in case of abuse: *People v. Pico*, 62 Cal. 52; *People v. Levy*, 71 Cal. 618, 12 Pac. Rep. 794; *State v. Murray*, 11 Or. 413. But even if reviewable and found to have been exercised erroneously, the defendant could not have been injured by this evidence, for the reason that it was confined to the defendant's symptoms, and that the sheriff's opinion was predicated upon

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his mental condition on the day after the alleged homicide. The fact that he did not have the symptoms of a person suffering from an attack of delirium tremens, and was not then, in the opinion of the officer, insane, did not prove that at the time the act was committed he was not laboring under an insane delusion. The most that can be claimed for it is, that it might strengthen the inference that if the defendant did not have those symptoms, and was not, in the opinion of the witness, insane the day after the commission of the act, that, therefore, he was sane when it was committed. It is within the discretion of the trial court to admit evidence upon the question of the sanity of the person accused, at the time of committing an offense, and of his acts, conduct, and habits at a subsequent time which would fairly justify any inference of insanity relating back to the time of the alleged offense: *Commonwealth v. Coe*, 115 Mass. 481; *Commonwealth v. Pomeroy*, 117 Mass. 143.

2. The state, upon the cross-examination of Victor Hansen, defendant's son, showed by him that the first time he saw his father after he was placed in jail, was on Saturday forenoon, and, over objection, was permitted to show that defendant's counsel was with him at the jail and had a conversation with his father. The record shows that on Saturday morning, just before the defendant was visited by his counsel, he made the following confession:—

“On Wednesday, July twenty-sixth, last, I was duly sober all day. I left Burnside's scow about half past six and went home and met my wife coming from Svenson's; when I got in the house I laid down on the sofa. She said if you don't go to work I will kill you. I said I have been out fishing all night, and I now want to rest. I then went up stairs to bed. I slept then until the steamer Miler whistled. In the afternoon, about fifteen

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minutes after three, I then got up and went down stairs to urinate, and my wife was then sitting in front of the house. After I got through urinating I went up stairs again and laid down in the bed until about forty-five minutes after three. I went down stairs again, and my wife told me to help her pick berries. 'I said I have little time, but I will help you, anyhow, but I want to give the chickens water first. My wife was then in the raspberry patch alongside of the chicken-house picking berries. I then helped her pick berries. While we were picking berries, she said: If you don't leave the place I will kill you. I said, I don't want to leave. She then picked up a rock and threwed it at me. I had a stick and an ax standing by the chicken-house, with the intention of driving it out in the pasture to tie the calf on. The stick was about three feet long with a knot close to the end. I struck her with that stick, and the knotty part hit her on the head. I was standing behind her a little to the left, and she was stooping down a little picking berries. She never said nothing after she fell in the place where she was found. I staid there with her until she was dead. I then went back to the house and staid there about two minutes, and then went back again to where my wife laid and looked at her, and then went away again. It was about forty-five minutes after four. I then went to the tide land and notified John Nylund, and told him the same as I testified to at the coroner's inquest. After I came back from the tide land, before Nylund got to the house, I chopped part of the stick I killed my wife with and put it in the woodbox, and that evening burned it up in the stove.

"JOHN HANSEN.

"Signed in the presence of:

"H. A. SMITH.

"F. I. DUNBAR.

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"Done on Saturday morning, July twenty-ninth, eighteen hundred and ninety-three."

The following statement was made by the defendant and added to the confession, but was not signed by him: "After she was dead and lying where she was found, I took the keys out of my wife's right-hand pocket of her dress, and I went in the house and opened the lower drawer of the bureau to look for some papers, and found a bottle of kimmell. There was about one good swallow in the bottle, and I drank that, and then took out the keys and put them in the upper drawer, but I never opened it. I was duly sober and in good humor."

The confession was introduced in evidence by the state, which also called Peter Svenson, who testified that defendant, while in jail, and after he had seen his counsel, in speaking of the alleged homicide, admitted "that he did it," and said: "There was a club lying there that was to change the calf in the pasture, and he took up that club to change the calf, and all of a sudden he had an impulse and took the club and hit his wife over the head. He said he had no cause for it whatever, and he didn't know at that minute what he done it for, but he said he done it, and he didn't hardly know how it happened himself at the time." The latter confession materially differed from the former, and tended to support the theory of the defense. In offering it in evidence on the part of the prosecution, the witness was permitted to testify that it was made by the defendant after consultation with his counsel. This it is contended was error. No evidence was offered of what was said at any time between the defendant and his counsel. How, then, was he prejudiced by proof of the fact that his counsel visited and conferred with him? He had a right to employ and consult counsel in order to prepare for his defense. The bill of exceptions does not show that counsel for the state

alluded to or commented upon this fact in the argument, or that defendant took exceptions to any argument tending to lead the jury to infer that the theory of the defense was formulated at the time defendant and his counsel had this conference. The question to which the testimony objected to was a response was asked in the cross-examination of the defendant's witness upon a collateral matter, and in such case it is largely within the discretion of the trial court to say to what extent the inquiry shall be extended: *Greenleaf on Evidence*, § 449.

3. The defendant's counsel contends that the court erred in admitting testimony as to the nature and value of the estate of deceased. The testimony objected to tended to prove that deceased kept her money in the bureau drawer, the key to which she was in the habit of carrying in her pocket; that when the body was discovered the key was not there, but was found in the bureau drawer; that defendant, just prior to the alleged homicide, had no money, and that when the sheriff arrested him there was found upon his person fifty-two dollars. It also appears that the state was permitted to show by Victor Hansen, administrator of his mother's estate, over the objection of defendant's counsel, that after his mother's death he found in said bureau drawer five dollars in money, and certificates of deposit and notes to the amount of twelve hundred dollars. This evidence was admissible as tending to corroborate the defendant's confession, to show his connection with the commission of the crime and the motive for its perpetration: *Hendricksen v. People*, 10 N. Y. 13, 61 Am. Dec. 721.

4. The defendant's counsel contends that the court erred in giving the sixth instruction, to which he excepted, and which is as follows: "Among the defenses suggested in this case is insanity. The defense of insanity or mental incapacity to form an intent, or to deliberate,

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is a defense that the defendant has a perfect legal and moral right to avail himself of, if he can establish it, and it is your duty, under your oaths, to give to the evidence on this branch of the case the same careful consideration that is required of you as to the other portions of this case. The law presumes every man to be sane until he establishes in the mind of the jury, beyond a reasonable doubt, the fact of his insanity. In other words, the burden is upon the party claiming insanity as a defense, to make out that defense beyond a reasonable doubt. And if you have any doubt as to whether the prisoner at the time of the commission of the alleged homicide, if he did commit it, was sane or insane, the state is entitled to the benefit of such doubt, and you should reject such defense." The court in its general charge correctly defined a reasonable doubt, and in the foregoing instruction informed the jury that "the law presumes every man to be sane until he establishes in the mind of the jury, beyond a reasonable doubt, the fact of his insanity. In other words, the burden is upon the party claiming insanity as a defense, to make out that defense beyond a reasonable doubt." Then the court says: "Now, if you have any doubt," etc. What meaning could a person of common understanding gather from the word "any" used in that connection other than that it referred to such a doubt as he had twice previously alluded to in the same paragraph? The word "such" might have been a better selection, but, however that may be, to hold that the jury were instructed that if they entertained any doubt, however slight or trivial, they must give the state the benefit thereof, would be to render the preceding part of the charge perfectly senseless. But assume that the word reasonable was inadvertently omitted after the word "any," was the alleged error corrected by other instructions? "Although," says Mr. Rice, "an instruction, con-

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sidered by itself, is too general, yet if it is properly limited by others given on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instructions": 3 Rice on Evidence, § 140.

The seventh and tenth instructions given by the court are as follows:—

"7th. It is not every crochot or mere crankiness, or eccentricity of mind, however well established, that will excuse the commission of an act, otherwise criminal. If a party, notwithstanding some mental disease or infirmity, still has reason enough to know the act which he purposes to commit is wrong and unlawful, and knows its nature and quality, and has left the power of deliberation and premeditation, and the power to do or refrain from doing the act charged as a crime, such mental disease will not avail as a defense. In other words, while the law will not punish a man for an act which is the result of or produced by mental disease, it will punish him for an unlawful act not the result of or produced or influenced by mental disease, even though some mental unsoundness is shown to have existed. Voluntary drunkenness is no excuse for a crime, and our statute provides that no act shall be any less criminal by reason of the fact that the party committing it was in a state of voluntary intoxication. You can, therefore, only consider intoxication in determining whether or not the defendant was in such a state of mind as to be capable of having an intent to kill, and in determining whether there was premeditation, deliberation, malice, or cool blood. 'There shall be some other evidence of malice than the mere proof of the killing, to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the

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first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion.' But if deliberation, premeditation, malice, or cool blood existed, and the killing was the result of them, the fact, if it be a fact, that he was intoxicated, or under the influence of liquor, when he committed the alleged homicide, if you find that he did commit it, is no defense; that is to say, if he was too much intoxicated or too insane to deliberate or premeditate, you cannot convict him of murder in the first degree. If he was too much intoxicated to have an intent to kill, you cannot convict him of murder in the second degree, and if, from all the testimony in the case, you have a reasonable doubt on these subjects, you should give him the benefit of such doubt; but beyond this you cannot go; remembering all the time that the law presumes every man sane and sober until the contrary state is shown to exist." "10th. This is a criminal case, and, before you can convict the defendant, you must be satisfied beyond a reasonable doubt of every fact necessary to constitute the crime charged in this indictment; that is to say, if you have a reasonable doubt as to any fact that would be necessary to constitute murder in the first degree, you could not convict him of murder in the first degree. If you have a reasonable doubt as to the deliberation, premeditation, malice, or purpose, you could not convict him; if you have a reasonable doubt as to the malice and purpose, you could not convict him of murder in the second degree. He has the right to the benefit of a reasonable doubt at all stages of the case. But by reasonable doubt is not meant every possible doubt that may arise in a man's mind, because there is nothing but what is open to some possible doubt. It has been defined as a doubt that leaves your mind in that condition that

you cannot say you have an abiding conviction, to a moral certainty of the truth of the charge, and, therefore, of the guilt of the defendant. It must be a doubt arising naturally out of the facts of the case. It is not a mere imaginary doubt, conjured up from your sympathies or from your prejudices, or to escape the consequences of a verdict, but it must be a substantial doubt,—such a doubt as would cause you to pause and hesitate upon the most important affairs of your life. If you have such a doubt, you should give the defendant the benefit of it. If you have a doubt whether he killed the deceased or not, or whether the blow was the cause of the killing, or if you are satisfied the killing was unlawful, but if you have a doubt as to what degree it is, you should acquit him of the degree concerning which you have a reasonable doubt. You should give the defendant the benefit of all reasonable doubts; and there is no technical way of judging it, other than using your ordinary, plain, common sense and judgment. You are to take this testimony and judge it as a whole, weighing all the facts in the case.” In *State v. Johnson*, 8 Iowa, 525, 74 Am. Dec. 321, an instruction had been given that failed to contain the element of premeditation, in defining the crime of murder in the first degree. The bill of exceptions in that case did not include the other instructions, and it nowhere appeared that this element had been correctly defined, yet the court, in commenting upon the probability of the correct interpretation of the element of premeditation being contained in the other instructions, say, “if it so appeared from the record, we might be justified in holding, taking the instructions together, that there was no prejudice to the prisoner’s cause from its omission in the third instruction.” “It is not contended,” says SEEVERS, C. J., “that every proposition should be accompanied with or qualified by the

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doctrine of reasonable doubt. It is sufficient if the court says that every fact necessary to convict must be established to their satisfaction beyond a reasonable doubt": *State v. Maloy*, 44 Iowa, 104. If then the omission of the word reasonable made the instruction too general, it was properly limited by others.

The remaining question is directed to the inquiry, Is it probable that the jury was misled by the omission? Whenever the instructions, considered as a whole, are substantially correct, and could not have misled the jury to the prejudice of the defendant, the judgment will not be reversed because some instruction, considered alone, may be subject to criticism: *People v. Cleveland*, 49 Cal. 577; *Story v. State*, 99 Ind. 413. It must be presumed that each member of the jury possessed, at least, ordinary common sense, and was capable of understanding the whole charge in its connected relations, and in its application to the facts of the case: *People v. Bagnell*, 31 Cal. 409. The instructions given by the court fully state the law as applicable to the facts of the case at bar, and the judgment ought not to be reversed except for some palpable error which would afford a dangerous precedent: *Stout v. State*, 90 Ind. 1. Courts owe a duty to persons accused of the commission of crime, to see that they have a speedy, fair, and impartial trial in the mode prescribed by law, and, while this is true, they also owe a duty to society to suppress crime and punish those who have been legally convicted thereof. In the discharge of this duty we are not unmindful of the importance of avoiding the adoption of any rule which might become dangerous as a precedent, but we fail to see that any dangerous precedent would be established by adopting the rule that instructions should, in criminal as well as in civil cases, be considered in their entirety, and that a single instruction which might be subject to the criticism of being too

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general, when not misleading, furnishes no just reason for reversing a judgment, when properly limited by other instructions that correctly state the law.

5. Defendant's counsel contends that the court erred in refusing to give the following instructions, requested by the defendant: "3d. I charge you further, in regard to the question of the defendant's intoxication at the time of the killing of deceased (if you find that he killed her), it is provided by the statutes of this state that 'whenever actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.' Now, in order to constitute the crime charged, there must have been purpose and intent on the part of the defendant to commit it, and, therefore, if you find that at the time of killing deceased (if you find defendant did it), defendant was intoxicated to such an extent, or laboring under temporary insanity by reason of previous intoxication or excessive use of alcoholic liquors to such a degree, that he was incapable of forming a purpose or intent, you cannot find him guilty of murder in the first degree." "4th. The fact (if you should so find it) that defendant killed the deceased, even though you should find that he did it wilfully and maliciously, it is not sufficient alone to convict him of murder in the first degree. In addition to these elements, there must be proof of deliberation and premeditation, and in order to prove premeditation and deliberation, there must be some evidence of a design, of premeditation and deliberation such as would be evidenced by lying in wait, by the administering of poison; or some kindred act showing a previous consideration of the act; and that the act was done deliberately, formed

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and matured in cool blood, not hastily upon the occasion, otherwise you cannot find the defendant guilty of murder in the first degree."

The questions presented by these requests are embodied in the seventh instruction given by the court. That portion of section 1358 of Hill's Code applicable to the question of intoxication as a defense is as follows: "Whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act." It will be observed that the instruction given by the court omitted the words "purpose and motive" and limited the inquiry to the defendant's state of mind as to whether, from the effect of intoxication, he was capable of having an intent to kill. His motive for the act may have been to acquire personal gain or to gratify his anger or revenge, and yet, if he were too intoxicated to premeditate and deliberate upon an intent to kill, he could not have been convicted of murder in the first degree, as the court charged the jury. The intent with which he committed the act, and not the motive or purpose, is the test of his criminal liability in determining the degree of his guilt, and hence, under the evidence in the case, the omission of these words could not have been prejudicial to his rights, under the instruction given by the court. Had self-defense been the issue, as indicated in the first confession, then the motive and purpose of the act might have been material questions, but this theory was abandoned, and the defense of an insane, irresistible impulse was substituted therefor, in which motive and purpose, under the evidence in the case, did not form an element.

6. Another objection to the seventh instruction, as

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presented by the requests, is urged to that part of it which says: "But if deliberation, premeditation, malice, or cool blood existed and the killing is the result of them," the fact, if it be a fact, that he was intoxicated, or under the influence of liquor, when he committed the alleged homicide, if you find that he did commit it, is no defense." From this it is contended that the court told the jury in effect that if malice existed, then intoxication could not be considered; that the use of the word "or" after the word "malice" made either element, viz., deliberation, malice, or cool blood, sufficient to constitute murder in the first degree, and that intoxication would not reduce the grade. This contention might be tenable if the court had used the word "either" in referring to the several elements, but it will be observed that the word there used is "them," and hence it follows that all these elements were necessary to overcome the fact of intoxication, if it existed, and certainly the instruction was as liberal as the defendant could reasonably expect. The fourth request is also embodied in the seventh instruction, but it is contended that since there was no claim at the trial, nor charge in the indictment, that the killing was effected in the commission of any felony, it was error to include in the instruction the words, "unless the killing was effected in the commission or attempt to commit a felony." The court in this part of the instruction quoted the language of the statute and there having been no charge or claim that the killing was effected in the commission or attempt to commit a felony, the jury must have realized that they were instructed that the proof of premeditation and deliberation, in addition to the mere fact of killing, was required.

Defendant's counsel also contends that the court erred in failing to give the following instructions requested by the defendant: "7th. The deliberate use of a deadly

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weapon by the defendant, and the fact that he killed the deceased with it, without further proof of deliberation and premeditation, is not sufficient to constitute murder in the first degree; therefore, if you should find that the defendant purposely and maliciously killed the deceased, by the deliberate use of a deadly weapon, but that there is no other proof of deliberation and premeditation than the fact of the killing, and the deliberate use of such weapon in killing her, or, if you entertain a reasonable doubt in this respect, you cannot find him guilty of murder in the first degree, but of murder in the second degree only.”

“10th. I further charge you that in order to find the defendant guilty of murder in the first degree, you must be satisfied beyond a reasonable doubt that he was in such a condition of mind as to be able to deliberate and premeditate; and you must be satisfied beyond a reasonable doubt, by evidence in addition to the mere fact of the killing of the deceased, and the deliberate use of a deadly weapon, that in so doing he did it of deliberate and premeditated malice, otherwise you cannot find him guilty of murder in the first degree.” In the seventh instruction, the court charged the jury that there must be other evidence of malice than the mere proof of killing to constitute murder in the first degree, and fully covered these requests.

7. It is further contended that the court erred in failing to give the following instructions, requested by the defendant: “9th. I instruct you that in this case there is not sufficient proof of premeditation and deliberation, and therefore, you cannot, in any event, find defendant guilty of a higher crime than murder in the second degree.” And that there was no evidence of malice, in addition to the mere fact of killing, to support the charge of murder in the first degree. The testimony shows that when the defendant returned from Astoria on

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Sunday evening preceding his wife's death, he stated that he did not have a nickel; that he was at home at the time she was killed; that deceased kept her money and valuable papers in a bureau, the keys to which probably were in the pocket of the dress she had on when she was killed; that the pocket in this dress was partly turned inside out when the body was first seen by others; that the defendant took the keys from her pocket after striking her with the club, and opened some of the drawers of this bureau before he notified any one of her death; that the person who first went to the house after her death found the keys in the bureau; that this person, who was a witness at the trial, had left his money with the deceased and when he saw the keys in the bureau he told the defendant that his money was lost; that the defendant said to him: "You never lost a nickel; your money is there all right"; that this witness and the defendant then went to the drawer and looked for the witness' money but did not find it; that the witness went away leaving the defendant in the room where the bureau was and in a few minutes returned and found his money among some clothing in the bureau; that the defendant was present when the witness found the money, and that when the defendant was put in jail on Thursday evening the sheriff found fifty-two dollars on his person. This evidence was in addition to the proof of killing, and it was a question of fact for the jury to say by its verdict whether from these circumstances an inference that the defendant had deliberated and premeditated upon the commission of the act before he struck the fatal blow could reasonably be drawn, and hence there was no error in refusing to give the instruction requested.

8. Defendant's counsel contends further that the first confession, made to the sheriff, in which he stated that his wife, to whom he had been married thirty years,

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and with whom he never had any difficulty; that she who had always treated him with affection should, without any provocation, throw a stone at him, is absurd, and the further statement therein that he was duly sober and in good humor when he killed her, conclusively shows that when he made this confession he was insane, and that the subsequent confession, made after he had recovered from the effects of the liquor, further confirms this conclusion. That the evidence of his habits, symptoms, and mental condition when recovering from a protracted drunken debauch, and the testimony of the medical experts show beyond a reasonable doubt that at the time the defendant struck the fatal blow he had not sufficient control of his mental faculties to premeditate and deliberate upon the atrocity of the act, and therefore was incapable of forming an intent to kill. Section 1358, Hill's Code, provides that "When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt." This statute requires the accused, when insanity is plead as a defense, to establish the fact beyond a reasonable doubt. It is not in the province of courts to question the policy of the law or to say that the rule established in such cases is inhuman, or that the state should, in any contingency, be required to establish the fact of sanity like any other fact, beyond a reasonable doubt. From the facts and circumstances of the case, the jury were at liberty and it was their duty to say by their verdict whether the design to kill was formed and matured in cool blood, and not hastily upon the occasion, and having so found, under proper instructions from the court covering all the issues of the case, the judgment must be affirmed.

AFFIRMED.

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ON REHEARING.

[36 Pac. 296.]

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The defendant, in his petition for a rehearing, contends that the state, having, as part of its case, introduced evidence of the defendant's mental condition, tending to raise an inference that he was, at the time of committing the act charged, incapable of forming a design, and this inference having been strengthened by the evidence for the defendant, that, therefore, the burden of proof was upon the state to establish the defendant's sanity beyond a reasonable doubt, and not upon the defendant to establish his insanity by the same degree of proof. In *State v. Hill*, 14 Southern R. 294, the supreme court of Louisiana held that, though the state had introduced evidence tending to show incapacity to form a design to kill, the defense was, nevertheless, special, and, like any other, must be proved by the party urging it, to the satisfaction of the jury, and that it was not the duty of the state to prove a negative by showing beyond a reasonable doubt that the defendant's state of intoxication was of a degree not to interfere with his judgment and intelligence, or preclude the possibility of his entertaining malice towards the deceased. In *State v. Coleman*, 27 La. Ann. 691, the following charge was held to be undoubtedly correct: "Drunkenness is no excuse for a crime, and any state of mind resulting from drunkenness, unless it be a permanent and continuous result, still leaves the person responsible for his acts." The court properly charged the jury that the defendant must have had sufficient mind to know that the contemplated act was wrong, and sufficient will power to refrain from its commission, and the jury, under proper instruc-

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tions, having found against the defendant upon these questions, the petition for a rehearing must be denied.

AFFIRMED.

[Argued January 18; decided February 26, 1894.]

CALVERT v. IDAHO STAGE CO.

[S. C. 36 Pac. Rep. 24.]

1. **POWER OF AGENTS TO BIND CORPORATIONS—IMPLIED AUTHORITY OF AGENTS.**—The old rule that a corporation could only appoint an agent under its corporate seal is now obsolete, and it is settled that, in the absence of some restriction, a corporation may by parol confer upon an agent authority to perform any act which the corporation may lawfully do; and in some cases this authority will be implied.
2. **CORPORATION—PARTNERSHIP—CO-OWNERSHIP.**—A corporation may become a co-owner with an individual in a business or enterprise within the scope of its corporate powers, although it cannot as a general rule enter into partnership with an individual. *Hackett v. Multnomah Ry. Co.* 12 Or. 124, cited and approved.

APPEAL from Douglas: J. C. FULLERTON, Judge.

This is an action by James Calvert against the Idaho Stage Company, a corporation organized under the laws of Utah. The complaint contains three causes of action,—first, for money paid at the request and for the use and benefit of the defendant; second, for a balance alleged to have been found due the plaintiff on an account stated for moneys advanced and disbursed by him as agent of the defendant in managing its mail routes in Oregon and Washington; and, third, for services rendered to the defendant as such agent from the first day of April, eighteen hundred and ninety, to the thirty-first day of July, eighteen hundred and ninety-two, at the agreed and reasonable worth and value of seventy-five dollars per month. The answer denies all the allegations of the complaint, except the incorporation of the company, and,

35	419
26	154
36*	24
37*	457
25	412
32	535

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for an affirmative offense, alleges: That during all the times mentioned in the complaint plaintiff and defendant were partners in certain mail contracts in Oregon and Washington, under the firm name of Idaho Stage Company, which partnership will not expire until June thirty, eighteen hundred and ninety-four; that any moneys paid out, or settlement had for moneys advanced and disbursed, or services rendered, as mentioned in the complaint were for and on account of the said partnership, and not for or on account of defendant. The reply put in issue the allegations of the answer, and the trial resulting in a judgment for plaintiff, the defendant appeals, assigning error in the exclusion of testimony and instructions to the jury.

REVERSED.

Messrs. Wm. R. Willis and Julius C. Moreland, for Appellant.

Messrs. J. W. Hamilton and E. B. Preble, for Respondent.

Opinion by MR. JUSTICE BEAN.

To maintain the issues on its part, the defendant, after showing that the business for which it was organized, and in which it was and is engaged, is contracting for and carrying United States mails, express, and passengers, and subletting mail contracts, produced and submitted evidence tending to show that in December, eighteen hundred and eighty-nine, the plaintiff and Mr. Salisbury, the president and general manager of defendant, entered into a contract by which it was agreed that the defendant should bid on certain mail routes in Washington and Oregon, soon to be let by the government, and that plaintiff and defendant should have an equal interest in such contracts as might be secured; that plaintiff should

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advance the necessary money with which to stock such routes; that they should own and operate them jointly, each to pay one half of the expense of stocking the routes and running the business, and to receive one half the profits, and that plaintiff should have charge of and superintend the subletting of all contracts and routes thus obtained; that in pursuance of this agreement, defendant did bid on and obtain certain routes, and advance money for the purpose of stocking them; that the same have been owned and operated by the plaintiff and defendant under the agreement referred to, and that the money paid out and services rendered by the plaintiff for which this action is brought were furnished and performed on account of such agreement and not for the defendant. To further support this issue defendant offered in evidence that portion of the deposition of C. L. Haines, its treasurer, wherein he testified to the agreement between Mr. Salisbury and the plaintiff, but, on objection thereto, it was excluded because no formal resolution of the board of directors was shown authorizing Salisbury to make such a contract on behalf of the company. To the exclusion of this testimony an exception was reserved by the defendant, and the question thus presented was raised in different forms throughout the trial, and is the principal question on this appeal.

1. It was formerly the rule that a corporation could only appoint an agent under its corporate seal, but this doctrine has been universally abandoned, and it is now held that in the absence of a formal provision in its charter, or the law of the state under which it exists, a corporation may confer authority upon an agent to perform any duty within the scope of its corporate powers, by parol, and that such authority may be implied as in other cases: *Mechem on Agency*, § 97; *Martin v. Webb*, 110 U. S. 7. The evidence in this case shows, and it is

Opinion of the court—BRAN, J.

not disputed, that Mr. Salisbury was acting as the president and general manager of the defendant corporation during the transaction out of which this controversy arose, by consent and acquiescence of the company, and that it ratified his contract with the plaintiff, whether it was one of employment simply, as claimed by him, or such a contract as defendant attempted to prove. The entire business of the corporation in relation to the mail routes in Oregon and Washington was conducted by Mr. Salisbury as its agent, and plaintiff claims to have been employed by and to have made all his reports and received orders and directions from him, and it seems to us, therefore, that his authority to make the contract in question was amply shown, if the corporation could legally enter into such a contract.

2. But it is said that the evidence offered tended to show a partnership agreement between the plaintiff and defendant, and it is contended that a corporation cannot legally enter into such a partnership. As a general rule this is true, but it may become a coöwner with an individual in a business or enterprise within the scope of its corporate powers: *Hackett v. Multnomah Ry. Co.* 12 Or. 124, 53 Am. Rep. 327. The evidence in this case offered and excluded tended to show all the essential requisites of a partnership, but because of a want of capacity in a corporation to form such a relation it perhaps would only amount to a coöwnership or joint proprietorship between the corporation and the plaintiff. But for the purposes of this case the result would be the same. Plaintiff sues for money paid out and services rendered as the agent and employé of the defendant corporation, and, unless he maintain these allegations, he cannot recover. If he was a coöwner in the business he was manifestly not employed by defendant in its corporate capacity as its agent or servant, and cannot recover against it for the

Opinion of the court — BEAN, J.

value of his services rendered in the furtherance of a joint undertaking. In fact, the court below seems to have been of this opinion, for it instructed the jury in substance that if the contract was made, as claimed by the defendant, plaintiff cannot recover. But this instruction could not cure the error in excluding material and competent testimony, offered by the defendant, tending to sustain its contention. The question in this case, as made by the pleadings and evidence, was, whether plaintiff was employed by and rendered services to the defendant corporation as its agent or servant, or was acting for himself in conducting and managing the mail routes referred to in the pleadings, and it is immaterial whether the agreement amounted to a technical partnership, or simply a coownership. It was claimed at the argument that the error in excluding the testimony of Haines is not available on this appeal, because the record does not show an offer to prove made by the defendant at the time the objection to the question propounded to Mr. Haines was sustained. But we do not so read the record. From the bill of exceptions it appears that defendant's counsel offered to read the deposition of Haines at the opening of its case, but was prevented from so doing by the adverse ruling of the court, and, at a subsequent stage of the trial, again offered the deposition, question by question, to which objection was made and sustained, and the answers thereto as copied from the deposition being incorporated in the bill of exceptions, it clearly appears by the record what the testimony was intended to show. We conclude, therefore, that in excluding the testimony of Mr. Haines the court erred, and for this reason the judgment must be reversed. And as the other questions suggested at the argument depend in a large measure upon this, and will probably be avoided on another trial, their further consideration is deemed unnecessary at this time.

REVERSED.

Statement of the case.

[Argued February 12; decided April 3, 1894; rehearing denied.]

BABBIDGE v. CITY OF ASTORIA.

[S. C. 35 Pac. Rep. 291.]

25	417
26	426
26*	291
26*	298
25	417
26	605
29	608

MUNICIPAL CORPORATIONS.—City ordinances approved and signed by the president of the city council acting in place of the mayor, who has resigned, are a nullity, under a charter which authorizes such president to act in the place of the mayor, and perform his duties in case of the latter's temporary absence or disability, but confers no such right to act when the office is vacant.

APPEAL from Clatsop: THOS. A. McBRIDE, Judge.

This is a suit in equity by J. W. Babbidge to enjoin the defendants from selling lots one and two in block seventy-five, McClure's Astoria, owned by the plaintiff, which lots C. W. Loughery, as chief of police, was proceeding to sell pursuant to certain warrants alleged to have been duly issued for the collection of street assessments made against said lots to defray the expenses in part of improving Court Street in said city, and also to have such assessments canceled and declared void. The claim of the plaintiff is that the ordinances of the city upon which the collection of the assessments in controversy is sought to be enforced are null and void, for the reason that such ordinances were not approved and signed as required by the charter. The facts are, in substance, that the plaintiff is the owner of lots one and two in block seventy-five, in McClure's Astoria, and that such lots abut on Court Street; that the ordinances fixing the grade and prescribing the time and manner of improving the street were passed by the council, and approved and signed by Isaac Bergman, as president of the council, at the dates specified; that the city, in making the improvement, and in proceeding to collect the assessment against such lots, derived its authority so to do from such ordinances; that on the fifteenth day of

Statement of the case.

April, eighteen hundred and ninety-one, and prior to the passage of such ordinance, M. C. Crosby, who was then the duly elected and qualified mayor of Astoria, sent his written resignation of such office to the council, which resignation was accepted by that body and entered at large upon its journal; that on the twenty-eighth of the same month, at a meeting of the council, Mr. C. W. Fulton was appointed to fill the vacancy created by such resignation, but that he failed to qualify, and at the next meeting of the council formally declined the office; that on the twelfth day of November, eighteen hundred and ninety-one, but some time after the passage of such ordinance the council appointed Mr. S. E. Elmore, who immediately qualified and assumed the duties of such office, and that during the interim between Crosby's resignation and Elmore's appointment Councilman Bergman was president of the council.

Upon this state of facts, the contention for the plaintiff is that the office of mayor became vacant on the resignation of Crosby and its acceptance by the council, and that, while such office remained vacant and without an incumbent, Bergman, as president of the common council, was not authorized to approve and sign ordinances, as acting mayor, so as to put them in force, and hence, that his approval and signing of the ordinances in question would not avail to give them force or effect. The charter provides that "an office shall be deemed vacant upon the death or resignation of the incumbent" (section 27), and that a vacancy so caused "must be filled by appointment by a majority of the remaining members of the common council, to continue during the remainder of the term" (section 28), and that "any officer appointed to fill a vacancy must, within five days from the date of such appointment, qualify therefor as in the case of an officer elected, or he shall be deemed to have de-

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clined, and the office considered vacant": Section 29. By force of these provisions, the resignation of Crosby created a vacancy in the office of mayor, and, as Fulton declined and failed to qualify, such office remained vacant and without an incumbent until the appointment of Elmore by the council. The charter also provides that the mayor is ex-officio president of the council, who, when present, and the council in session, shall preside over its deliberations, and, although not entitled to vote, he has authority to preserve order and enforce the rules of the council, but "if the mayor should be absent at any meeting of the council, the president of the council shall act during the meeting, or until the mayor attends, and shall perform all the duties of the mayor. The president of the council shall be elected at the first meeting of the council in January of each year, or as soon thereafter as practicable, and, in the absence or inability of the mayor, shall perform all the duties of mayor, approve and sign all ordinances, warrants, bonds, contracts, or other papers requiring the approval of the mayor" (section 34), and further, that "no ordinance passed by the common council shall go into force or be of any effect until approved by the mayor, except as provided in sections 44, 45, and 46; *provided*, that in the absence of the mayor from the city the president of the council shall have the right and power to take and approve such ordinances as may be passed during such absence" (section 43), and that "during any absence of the mayor from the city or if he be unwell or for any reason be unable to attend, the president of the council shall be the acting mayor and perform all the duties of such office during such absence or disability, except as otherwise provided in this act": Section 47. There was a decree for defendants and plaintiff appeals.

REVERSED.

Mr. George Noland, for Appellant.

Opinion of the court—LORD, C. J.

Mr. Frank J. Taylor, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

It is manifest from the language of these provisions that it is a temporary absence or disability only which authorizes the president of the council to act in the place of the mayor, and perform his duties. He is not authorized to approve ordinances or perform the duties pertaining to the office of mayor when such office is vacant and without an incumbent. It is "in the absence or inability of the mayor," or "in the absence of the mayor from the city," or "during any absence of the mayor from the city, or if he be unwell, or unable to attend," that the president of the council shall perform the duties of mayor, "approve and sign all ordinances," or "have the right and power to approve such ordinances as may be passed during such absence." Within the purview of the charter, the office of mayor is an important branch of the city government, the duties of which can only be performed by an incumbent, or some one acting in his stead when he is absent or disabled. The charter contemplates that a mayor is *in esse*; and that the office shall not be without an incumbent in case of death or resignation, for it provides that it "must be filled" by the council. So that, when a vacancy occurred by the resignation of Crosby, it was the duty of the council to appoint a mayor. To compel the performance of this duty in the interests of the public, the intent of the charter is that no business of importance shall be transacted until such duty is performed, and the vacant office provided with an incumbent. Hence, before the president of the council was authorized to act as mayor or perform his duties, there must have been a mayor *in esse* who was absent or disabled. He can only act in the place of a mayor who is

unable to act by reason of absence or inability. These are conditions which must exist before the president acquires the right to perform the duties of mayor. As the office of mayor was vacant when the president of the council approved the ordinances in question, his approval did not carry them into effect.

While the signature or approval of the mayor is not always essential to the validity of an ordinance, when it is regularly passed, yet, if its submission to him for approval or veto is made necessary by the express terms of the charter, before the ordinance can become law, such requirement is mandatory, and the failure to observe it is fatal to the ordinance: *Dillon on Municipal Corporations*, § 331; 17 Am. & Eng. Enc. 243. The charter provides that "No ordinance passed by the common council shall go into force or be of any effect until approved by the mayor, except as provided in sections 44, 45, and 46," etc. These sections provide: "Upon the passage of any ordinance, the enrolled copy thereof, attested by the auditor and police judge, shall be submitted to the mayor by the auditor and police judge, and if the mayor approve the same, he shall write upon it 'approved,' with the date thereof, and sign it with his name of office, and thereupon, unless otherwise provided therein, such ordinance shall become law, and be of force and effect": Section 44. "If the mayor do not approve an ordinance so submitted, he must within ten days from the receipt thereof, return the same to the auditor and police judge, with his reasons for not approving it, and if the mayor do not so return it, such ordinance shall become law, as if he had approved it": Section 45. "Upon the first meeting of the council after the return of an ordinance from the mayor, not approved, the auditor and police judge shall deliver the same to the council, with the message of the mayor, which must be read, and such ordinance shall then

Opinion of the court—LORD, C. J.

be put upon its passage again, and if two thirds of all members constituting the council, as then provided by law, vote in the affirmative, it shall become a law without the approval of the mayor, and not otherwise": Section 46. It is plain from these provisions, that no ordinance can become a law and go into effect unless an enrolled copy thereof duly attested, shall be submitted to the mayor, and, after it is so submitted only by his express approval indorsed upon it, or, if he does not approve it, by his refusal to return it with his reasons therefor within the time specified, or, if he veto it, by a two thirds vote of the council over such veto. An ordinance which has not been submitted to the mayor, although regularly passed, cannot become law. It must be submitted to the mayor for his action before it can go into effect. Where an act provided that every resolution of the common council of the city should be presented to the mayor for his approval or veto it was held that a formal and literal presentation must be made or shown: *State v. Newark*, 25 N. J. L. 399. The object of these provisions of the charter is to submit the ordinance before it goes into effect to the calm and separate deliberation and responsibility of the mayor. The ordinance must not only pass the council but it must be subjected to the scrutiny of the mayor who is clothed with power to approve or negative legislative action. This being so, when the ordinances in question were passed and submitted to Bergman as president of the council he was not authorized to approve them as the office of mayor was without an incumbent, and, while such vacancy existed the contingency of absence or disability could not exist upon which his right to act as mayor in the approval of ordinances depended, and hence that such ordinances did not become law or go into effect. As a consequence, the proceedings founded upon said ordinances are a nullity, and the decree must therefore

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be reversed and the defendants enjoined from further proceedings in the premises. **REVERSED.**

[Argued October 28, 1893; decided April 8, 1894.]

FIORE v. LADD.

[S. C. 36 Pac. 572.]

INSTRUCTIONS TO JURY—PRACTICE.—A party to an action who has given evidence tending to sustain the issues on his part is entitled to have the jury instructed on his theory of the case.

APPEAL from Multnomah: E. D. SHATTUCK, Judge.

Action by Severio Fiore against the firm of Ladd & Tilton to recover money. Judgment for defendants and plaintiff appeals. **REVERSED.**

Mr. U. S. Grant Marquam, for Appellant.

Mr. Charles E. S. Wood, for Respondent.

Opinion by MR. JUSTICE BEAN.

This is the second appeal in this case. The facts are sufficiently detailed in 22 Or. 202, 29 Pac. 435, and need not be repeated here. On the second trial, in which the evidence was substantially the same as on the first, the court read from the former opinion, as its entire charge to the jury, the three proposed instructions numbered one, two, and three, for the refusal to give which a new trial was ordered, and, although repeatedly requested by plaintiff's counsel, refused to instruct upon his theory of the case, or as to the law applicable to the facts which his evidence tended to prove. Judging from the reasons given for the refusal to so instruct the jury, and the

25	423
29	580
25	423
38	308
25	423
39	813
25	423
43	114
25	423
45	573

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colloquy with counsel in reference thereto, the court must have thought that our decision on the former appeal in effect declared that the instructions refused contained the whole law of the case, and that those given on the former trial were erroneous. But no such question was presented or determined, nor does it seem to us any inference to that effect can be drawn from the language of the opinion, which begins the discussion of the question by saying, that "These instructions were designed to state the law as applicable to the facts as contended for by defendant," and concludes that because they were not given, either as submitted or in substance, the case should be reversed. In other words, there was a phase of the case not covered by the general charge, which, in the opinion of the court, entitled the defendant to the instructions asked; but it does not follow, nor did the court intimate, that there were not other features of the case upon which the jury should be instructed. Indeed, the statement of the case discloses that there was a direct conflict in the evidence as to who had possession of and deposited the money in bank, and the instructions under consideration were only applicable to the defendant's theory, and had no reference to plaintiff's contention.

The law is well settled that it is the duty of the trial court to instruct the jury upon the whole case, and not single out only those facts which have a tendency to establish one side or the other. It should declare the law applicable to the facts contended for, and submit the case to the jury upon the theory of both parties: *Thompson on Trials*, §§ 2328, 2329; *Swope v. Schafer*, 4 S. W. 300; *Winchester v. King*, 46 Mich. 102, 8 N. W. 722. Now in the case at bar the charge as given is only applicable to the evidence of the defendants, and submits to the jury only their theory of the case, and was therefore calculated to, and no doubt did, mislead the jury by causing

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them to believe that in the opinion of the court the evidence of plaintiff and his contention were unworthy of consideration. The plaintiff had a right and was entitled to have the case submitted to the jury upon the theory on which he presented it, and it was the manifest duty of the court, when requested by counsel, to have done so. It is no answer to this argument to say that the jury could not have found for the defendant under the instructions as given, unless they had been convinced that the facts assumed in the instructions were true, and that if the facts so assumed were true the theory of plaintiff could not possibly be true. The plaintiff had given evidence on the trial tending to sustain the issues on his part, and upon such evidence he had a right to have the jury instructed, and it was the duty of the court to submit both theories of the case to the jury in a clear and intelligible manner, and to so state the issues and the law applicable thereto that the jury might arrive at an intelligent verdict, and because it refused to do so the judgment must be reversed and a new trial ordered.

REVERSED.

[Decided April 8, 1894; rehearing denied.]

PARKER v. CITY OF ASTORIA.

APPEAL from Clatsop: T. A. McBRIDE, Judge.

Mr. George Noland, for Appellants.*Mr. Frank J. Taylor*, for Respondents.

Opinion by MR. CHIEF JUSTICE LORD.

This is a suit to enjoin the collection of certain street assessments against the property described in the com-

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plaint, and involves the same ordinances which were held to be invalid in the case of *Babbidge v. City of Astoria*. As such ordinances failed to become law, the proceedings founded upon them are void, and the decree must therefore be reversed and the defendants enjoined from further proceedings in the premises.

[Argued January 23; decided March 13, 1894.]

WILLIAMS v. TOLEDO COAL CO.

1. **MINES AND MINING—LIENS—LAWS, 1891, p. 76.**—The lien given on mining claims by the act of February twentieth, eighteen hundred and ninety-one, (Laws, 1891, p. 76,) applies to claims on which minerals have not, as well as to those on which minerals have, been found.
2. **MECHANIC'S LIENS—MINES.**—The lien given by the act of eighteen hundred and ninety-one, (Laws, 1891, p. 76, § 1,) for work performed in making shafts, drifts, etc., on a mining claim, or in searching for metals therein, does not include labor performed in building a wagon road, not constituting an incline or an excavation, since, when liens are given for specified classes of work, all other classes are impliedly excluded.
3. **MECHANIC'S LIENS—LUMP CHARGE.**—An account containing a lump charge, in which are mingled lienable and nonlienable items unsegregated, will not support a lien; nor in such cases can the defect be cured by oral evidence, separating the two classes of items. *Dalles Lumber Mfg. Co. v. Wasco Woolen Mfg. Co.* 3 Or. 527, and *Kearney v. Marks*, 15 Or. 529, approved and followed.

APPEAL from Benton: J. C. FULLERTON, Judge.

This is a suit by N. Williams against the Toledo Coal Company and others to foreclose a miner's lien. It appears from the record that the plaintiff, on July eleventh, eighteen hundred and ninety-two, filed in the office of the county clerk of Benton County, Oregon, the following notice:—

"Know all men by these presents, that I, Newton Williams, of the county of Benton, state of Oregon, do

25	426
289	164
120	445
25	426
34	125
25	426
37	294

Statement of the case.

hereby give notice of my intention to hold and claim a lien by virtue of the statute in such case made and provided upon" [here follows a description of the real property by government survey], "together with all improvements and appurtenances, and all situated in the county of Benton, state of Oregon, and more particularly states in 'Exhibit A,' attached and made a part hereof. The said lien being claimed and held for and on account of work done in and upon said premises from the first day of February, eighteen hundred and ninety-two, to the twenty-eighth day of June, eighteen hundred and ninety-two. The total value of said work and labor being five hundred and twenty-six and fifty one-hundredths dollars (\$526.50), upon which there has nothing been paid; that there is now due, owing, and unpaid to me, the said claimant, the full sum of five hundred and twenty-six dollars and fifty cents. The owner of this above described property is a corporation known as 'Toledo Coal Company,' organized and working under and by virtue of the laws of the state of Oregon. I was employed by one B. F. Jones, who was the superintendent of the above described premises for said corporation, to perform said work and labor.

(Signed)

"NEWTON WILLIAMS.

"STATE OF OREGON, }
"County of Benton. } ss.

"On this ninth day of July, eighteen hundred and ninety-two, personally appeared before me Newton Williams, and who being by me first duly sworn, on oath states that the abstract of indebtedness mentioned and described in the foregoing notice, is true and correct, and that there it still due and owing to him from the said Toledo Coal Company, for the labor aforesaid, the sum of five hundred and twenty-six dollars and fifty cents.

"H. G. DAVIS, Notary Public. [SEAL.]

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" EXHIBIT A.

"This lien is made and filed under and pursuant to an act of the legislative assembly of the state of Oregon, entitled 'An act for securing liens for laborers on mining claims and material-men, and prescribing the manner of their enforcement, approved February twentieth, eighteen hundred and ninety-one'; that the said lien and claim aforesaid is made for and on account of work, labor, and services, by me done and performed in the building and construction of a wagon road for the distance of about one fourth of a mile in length, and from fourteen feet to twenty feet in width, and labor in cutting a ditch in length about two hundred and twenty-five feet and in depth from about four feet to fifteen feet, and for labor in tunneling for the distance of about one hundred feet connecting with said ditch, and also in timbering and lagging for about one hundred feet in connecting the same with a certain coal mine, and all of the said work and labor being on the said premises and particularly on the following part and portion of the said premises, to wit, the northwest quarter of the southwest quarter of section thirty-one, in township ten south, range ten west, in said county and state."

The foregoing notice is made a part of plaintiff's complaint, to which the defendants demurred for the reason that it did not state facts sufficient to constitute a cause of suit, and that said notice did not comply with the requirements of the statute in such cases. The court sustained the demurrer and the plaintiff refusing to further plead, it was decreed that the suit be dismissed, and that the defendant recover his costs and disbursements in the suit, from which decree the plaintiff appeals.

AFFIRMED.

Messrs. J. R. Bryson and W. S. McFadden, for Appellant.

Messrs. Lawrence Flinn and Chas. E. Wolverton, for Respondent.

Opinion by MR. JUSTICE MOORE.

This suit is brought under the act of eighteen hundred and ninety one, (Laws, 1891, p. 76,) to enforce an alleged lien on the property of the Toledo Coal Company. Section 1 of said act provides: "That every person who shall do work or furnish materials for the working or development of any mine, lode, mining claim, or deposit yielding metals or minerals of any kind, or for the working or development of any such mine, lode, or deposit in search of such metals or minerals; and to all persons who shall do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or other excavation, designed or used for the purpose of draining or working any such mine, lode, or deposit, shall have a lien upon the same to secure to him the payment of the work or labor done or materials furnished by each respectively, which shall attach in every case to such mine, lode, and deposit, and though such shaft, tunnel, incline, adit, drift, or other excavation be not within the limits of such mine, lode, or deposit" (with some provisos not material here). It will be seen that said section gives the following liens: (1) To every person who shall do work or furnish materials for the working or development of any mine, etc.; (2) To every person who shall do work or furnish materials for the working or development of any such mine in searching for such materials or metals; and, (3) To all persons who shall do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or other excavation

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designed or used for the purpose of draining or working any such mine, lode, or deposit.

1. If the term "any such mine," in the second clause, relates to and means any mine, lode, mining claim, or deposit yielding metals or minerals, then a lien could not be acquired unless the search had been rewarded by a discovery of metals or minerals. Can it be supposed that the legislative assembly intended that the miner who had, at the request of the owner, performed labor or furnished materials in developing a mining claim, or in searching for metals or minerals therein, would be denied the benefit of a lien because his labor had not brought to light the hidden treasures of the earth? If that were the rule, then the miner who, in developing a claim, discovers indications of metals or minerals, could be discharged just before bringing to light the object of his search, and be deprived of any remedy against such claim for his labor or materials, while the employer, with a single blow of the pick or an additional blast, might reveal the wealth for which the laborer had toiled. Such a harsh rule could never have been intended, as its manifest effect would be to discourage the development of mines and the search for metals or minerals by men of moderate means. Under the law, as we understand it, the prospector or discoverer of lands supposed to contain metals or minerals is able to secure aid in prosecuting his search, as the miner is much more willing to give his services in developing mining property when encouraged by the assurance of reward for his labor which a lien on the property is likely to afford. Both parties would thus have a common interest in the development of the claim, and, though a lien would probably not amount to much unless a discovery were made, the miner, though he might be disappointed, would not be deceived thereby.

It is evident that the term "any such mine," in the

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last clause, refers to the mines mentioned in those preceding: That is, (1) to a mine that is being operated for the purpose of obtaining metals or minerals, or mining proper; (2) to labor or materials furnished in searching for metals or minerals in any designated tract that is supposed to contain them, or prospecting. Mining and prospecting are generic terms, which include the whole mode of obtaining metals and minerals, and the lien is given to every person who shall do work or furnish materials either in mining or prospecting. A lien is also given to all persons who shall do work upon or furnish materials for any shaft, etc., used for the purpose of draining or working any mine in which metals or minerals have been discovered, and to all persons who shall do work or furnish materials for any shaft, etc., designed for the purpose of working or draining any mine or place in which metals or minerals are supposed to exist, and such labor has been performed or materials furnished in prospecting for them.

2. A lien for labor performed or for material furnished in the construction, repair, or improvement of property is a remedy given by law, and unless the notice filed by the claimant shows *prima facie* upon its face a substantial compliance with all the essential statutory provisions, no lien is thereby created, however equitable the claim may be: Phillips on Liens (3d Ed.), § 9; *Gordon v. Deal*, 23 Or. 153, 31 Pac. 287. The claimant must by his notice clearly bring his claim within the provisions of the statute, and show that the labor was performed upon, or the materials were furnished for, the construction, repair, or improvement of that class of property which the statute has made liable for the payment thereof, in order to be entitled to its remedial advantages: *Barclay's Appeal*, 13 Pa. St. 495. Examining the notice in the light of the foregoing rules, it appears that a portion of the

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labor was performed in building a wagon road which is not alleged, either in the notice or complaint, to be an incline or excavation. No provision is made by the statute for constructing wagon roads, however necessary they may be to the successful operation of a mine. When liens are given for certain specified work, the rule of *expressio unius est exclusio alterius* applies (Phillips on Liens, 3d Ed. § 156), and hence no lien could attach for this class of work.

3. An account containing a lumping charge, in which is mingled an item for which no lien is given, will not support a lien; and the defect cannot be cured by oral evidence, by means of which the items for which a lien is given may be separated from those for which a lien is not given: 2 Jones on Liens, § 1419. In *Dalles Lumber and Mfg. Co. v. Wasco Woolen Mfg. Co.* 3 Or. 527, it was held that a corporation incorporated for the purpose of manufacturing and selling lumber could not acquire a lien for labor, and that, having joined in a lumping charge a claim for labor with that for material, no lien was thereby created. So in *Kezartee v. Marks*, 15 Or. 529, 16 Pac. 407, it was also held that a lumping charge for material furnished and used in the construction of a dwelling-house and fence did not create a lien upon the house, when that alone was sought to be charged by the lien. Following the rule established by these decisions, we hold that the claim for building the wagon road cannot be joined in a lumping charge with one for digging a ditch or running a tunnel, and, the claimant having joined them in his notice, no lien attached to the premises by reason thereof. Many other objections are made to the sufficiency of the notice, which we do not deem necessary to consider. It follows from the foregoing that the decree must be affirmed, and it is so ordered.

AFFIRMED.

Statement of the case.

[Argued January 15; decided March 12, 1894.]

WARD v. SOUTHERN PACIFIC CO.

[S. C. 23 L. R. A. 715; 36 Pac. 166.]

25	433
37	587
138	359

25	433
40	227

1. RAILROAD COMPANIES—NEGLIGENCE—TRESPASSERS ON TRACK.—The mere fact that persons have frequently trespassed upon a railroad track, and that the company has resorted to no means to stop such trespassers, does not amount to a permission or license to use the track as a footpath.*
2. *Idem*.—A railroad company owes to a trespasser upon its track no legal duty to keep a lookout or guard him against danger.
3. *Idem*.—The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck.

APPEAL from Douglas: J. C. FULLERTON, Judge.

Action by Roland Ward against the Southern Pacific Company for damages. The complaint alleges that by the negligence of the defendant in the management of its locomotive engine, a son of the plaintiff, about six years of age, was run over and killed. The answer denies such alleged negligence, and sets up as a defense that the plaintiff and his son were contributorily negligent. The reply denies the new matter in the answer. The cause being thus at issue, a trial was had, resulting in a verdict

* NOTE.—Most cases as to implied license to go upon railroad tracks have related to crossings as to which, see *Central R. R. & Bkg. Co. v. Ryles* (Ga.), 13 L. R. A. 634, and *note*, and *Chenery v. Fitchburg R. Co.* (Mass.), 22 L. R. A. 575. But as to claim of license to use track as a footpath, see also *Anderson v. Chicago St. P. M. & O. R. Co.* (Wis.), 23 L. R. A. 203. As to presumption of negligence of person found killed by alleged negligence of another, see *Hendrickson v. Great Northern R. Co.* (Minn.), 18 L. R. A. 261, and *note*. The question of presumption in the present case, it will be noticed, is that of the negligence of the railroad company and not that of the trespasser.—REPORTER.

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for the plaintiff, and from the judgment which followed this appeal was taken.

REVERSED.

Messrs. Earl C. Bronaugh and Wm. D. Fenton (Messrs. Lewis L. McArthur and Earl C. Bronaugh, Jr. on the brief), for Appellants.

Mr. J. W. Hamilton, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

It appears that at the close of plaintiff's testimony defendant interposed a motion for judgment of nonsuit, which the court overruled, and the defendant excepted. As the propriety of this ruling is questioned, our present inquiry is as to whether the testimony for the plaintiff is legally sufficient to warrant the verdict in his favor. The record discloses that the testimony for the plaintiff in substance is that he is a farmer, and that Freddie Ward, the deceased, who was his son, was about six years of age; that the railroad track passes through a field of plaintiff's farm, within about fifty yards of his residence, which stands inside of an enclosed yard, and adjoining this yard is the barn lot, from which a gate opens into said field; that on the afternoon of the day of the accident plaintiff was engaged in hauling wood through his barn lot to the side of the railroad track, where he piled it; that shortly before four o'clock in the afternoon of said day, which was the usual hour for the Southern Pacific train to pass his place in going to Roseburg, the plaintiff, having loaded his wagon, said to his son, "Run and open the gate so that I can get the load off before the train comes," which being done, he drove his team through the gate to the wood pile beside the track (the distance between the gate and wood pile being about fifty yards), and that the gate was left open by his direc-

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tion; that before reaching the wood pile the plaintiff looked back, and, not seeing his son, supposed that he had returned to the barn; that the last time plaintiff saw his son he was at the gate, and that about twenty minutes thereafter, but after the train had passed some five or ten minutes, Mrs. Clark found the dead body of the child, and gave the alarm, when the plaintiff ran to the spot, and saw the body of his son lying in the middle of the railroad track, with the shoulders about five or six inches from the rail, and the head dissevered from the body lying outside the rail near the wood pile, and some thirty feet from where the body lay; that from the time he last saw his boy at the gate, until the body was found by Mrs. Clark, the plaintiff did not know where his son was, but supposed that he was at the house, though he did not tell him to go there, or "notice him after that"; and that the wood pile at which plaintiff was unloading his wagon when the train passed was about seventy feet long, six or seven feet from the track, and eight feet high. There was some evidence tending to show that school children and other persons sometimes used the railroad track as a footpath, but none showing that the company knew or had notice that the track was so used; and the plaintiff admitted that he had not seen any school children so using the track for about a year previous to the death of his son. It was also shown that the track was open and straight, from the direction which the train came, for nearly half a mile before the place was reached where the child was found. This being substantially all the evidence for the plaintiff, the contention for the defendant is that such evidence wholly fails to prove the negligence alleged as a cause of action, and that, therefore, the trial court erred in not granting the motion for a nonsuit. As argued, this contention involves two points: First, that the evidence totally fails to show that the

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injury and death of plaintiff's son was caused by the negligence of the defendant or its employes in the management of the train at the time of the accident; and, second, that, conceding the negligence of the defendant, the plaintiff's evidence shows that in view of the circumstances he was guilty of negligence contributing to produce the fatal occurrence in leaving his son in such dangerous proximity to the railroad track.

As to the first point, it is put upon the ground that, as shown by the evidence, the company had the exclusive right of way where the accident occurred to the deceased, and hence that he was a trespasser upon its track, to whom the company owed no legal duty to keep a lookout or guard him against danger. The evidence shows that the body was found, not at a public crossing, or where people habitually pass over the track, and are known to be in the habit of doing so by those operating the trains, but in a field through which the railroad passes, and over which the company had the sole right of way. Some persons or school children living in the vicinity of the railroad track occasionally used it as a footpath, but without the knowledge or permission of the company; it was a license of their own taking which they took *cum periculo*, or subject to its perils. "Persons," says Mr. Justice NELSON, "living in the vicinity of railroads, who use the tracks or the embankments, or the space between the tracks, as a footpath are wrongdoers, unless permission is granted by the company so to use its tracks. Although pedestrians, or the public generally, travel over them without objection, people go there at their own risk, and, as said by the supreme court of Massachusetts, 'enjoy the license subject to the perils': *Gaynor v. Old Colony R. Co.* 100 Mass. 208, 97 Am. Dec. 96"; *Grethen v. Chicago, etc. Ry. Co.* 22 Fed. 609. User of this sort will not establish a public way over the track,

or relieve those so using it from the imputation of being trespassers. A railroad company has the right to the exclusive use of its track, unless a right of way or footpath over it has been acquired by its consent, express or implied, or a joint use has been reserved to the public, as at a public crossing. There is no doubt that if the company permitted the public, for a long time, to travel or habitually pass over its track at some given point, or use it as a footpath between different points, without objection or hindrance, its consent or acquiescence in such use might be presumed, and it would be bound to manage and run its trains with reference thereto. In such cases the company and the people have a common right or joint use in the track as a public way, and the right of each must be regarded. But the mere fact that persons have frequently trespassed upon the track, and that the company has resorted to no means to stop such trespasses, does not amount to a permission or license to use the track as a footpath. There is nothing in the case at bar to indicate that the public have acquired any right to use the track as a footpath or highway, with the consent or by the acquiescence or sufferance of the company, at the place where the accident happened. Such being the case, the deceased was on the track at a place where the company had the sole right of way, without its consent or acquiescence, and, in legal contemplation, he was wrongfully there, and must be regarded as a trespasser.

2. But, conceding the fact that the deceased child was unlawfully upon the track, and a trespasser, it is insisted by counsel for the plaintiff that, as the day was clear, and the track open and straight for nearly half a mile before the place was reached where the accident occurred, if the engineer of the company operating the train had kept such a vigilant outlook as the proper discharge of his duties required, he must have discovered

Opinion of the court—Lord, C. J.

the child in time to have stopped the train before reaching him, and his not doing so is negligence, and the proximate cause of the injury. In this view, the railroad company is bound to run its trains with reference to the probability of accident to trespassers on its tracks. This duty is founded upon the assumption that, although the defendant is not bound to exercise for the safety of a person on its track at a place where there is no public crossing that degree of diligence and care required as to passengers, yet, as the defendant employs a dangerous force in running its trains, it is bound at least to exercise ordinary care, when so employing it, so as to avoid injury to persons or property which may happen to be on its track; and if, by using such care, the accident would not have happened, the failure to use it, even though the injured party be a trespasser, is negligence which would render the defendant liable. This principle finds its illustration in *Houston R. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632, where the plaintiff, lying in a state of insensibility on the railroad track, not at a public crossing, was run over by the cars, and seriously injured. The court in that case says: "If the engineer on the approaching train keeps that lookout which is required of him at all times, not only to secure the safety of the train, but to avoid injury to any animal or person on the track, this person lying there in open view must be discovered. Not to discover him is, under the circumstances, negligence; and that negligence is the proximate cause of the injury, whilst the negligence of the party in going on the track is only a remote cause." Within this principle, "keeping a lookout" is regarded as a duty always devolving upon those running trains; and a failure in its performance, whereby an injury happens to a trespasser on the track, is negligence which must be regarded as the proximate cause of the injury. As, in

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this view, the duty of keeping a lookout is a requirement of ordinary care, although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employes from the observance of such care, and hence a "lookout" who does not see what, with due care, should have been seen, would not be in the proper discharge of his duty.

In *Harlan v. St. Louis Ry. Co.* 65 Mo. 22, HENRY, J., states the principle in this wise: "When it is said, in cases where the plaintiff has been guilty of contributory negligence, that the company is liable if, by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if, by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger and averted the calamity." Under this rule, ordinary care with regard to trespassers is exacted, and, in the absence of such care, a railroad company will be held liable. Hence the plaintiff contends that the failure of the engineer of the defendant to see the plaintiff's son on the track, although a trespasser, when he could have seen him if he had kept that lookout which his duty required, is a want of ordinary care, or negligence, which was the proximate cause of the injury, and renders the defendant liable. On the other hand, the defendant claims that it is not bound to keep a lookout for trespassers upon its track, but only to avoid injury to them, if possible, when their presence and liability to danger become known, and that this rule applies in the case of a child just as it does in that of a grown person. In short, the contention for the defendant is that the company is not liable to trespassers on its track, except

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where the injury was wilful, or where the company, after discovering his presence, fails to exercise reasonable care to prevent injury. In this view, the duty of the company begins when the trespasser is first discovered, and its extent is to refrain from doing him wilful or wanton injury. It is put upon the principle that it is not negligence to omit to do an act, unless there was a legal duty to perform it. As the railroad company is entitled to the exclusive use of its track, and is bound by no contractual relations to provide for the safety of trespassers, it is under no legal duty or obligation to take precautions, or keep a lookout against possible injuries to them, and hence the conclusion that the failure of those operating trains to see trespassers upon the track, whereby injury results to such trespassers, although they could have been seen if they had kept a watch, would not be negligence. The policy of the law is to make the track of a railroad clear of all obstructions which might impede its free and exclusive use, as being necessary, not only for the protection of the company and its employés, but for the safety of the traveling public. "Public policy," says BRANNON, J., "looking to the safety of not only those who walk on railroad tracks, but of employés and passengers on trains, requires that the law forbid the use of railroad tracks for that purpose": *Spicer v. Chesapeake & O. Ry. Co.* 34 W. Va. 516, 11 L. R. A. 383, 12 S. E. 533.

The track is the private property of the company, and was not built to be used as a highway for pedestrians. Being intended for the sole use of the company, except at public crossings, the law will not sanction its use as a footpath. Nor will the fact that people may have frequently used the track to walk on change the law, or render their act less unlawful. In some countries it is made a penal offense to go upon the track. Although it is not so with us, yet, as STRONG, J., says, "it is a civil wrong of

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an aggravated nature for it endangers not only the trespasser, but all who are passing or transporting along the line": *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 378, 84 Am. Dec. 457. As the law holds the company to a high degree of responsibility for the safety of its passengers and public convenience exacts rapid transit, common justice requires that the company should have a clear track: *Toomey v. Southern Pac. Co.* 86 Cal. 374, 10 L. R. A. 139, 24 Pac. 1074. "We hold these corporations," said PAXSON, J., "to a strict line of responsibility whenever passengers are injured by accidents to their trains. It follows that we should be equally emphatic as to their control of their tracks. Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company has not only a right of way, but such right is exclusive at all times, and for all purposes. This is necessary, not only for the proper protection of the company's rights, but also for the safety of the traveling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a single foolhardy man who desires to walk upon the track. In England it is a penal offense for a man to be found unlawfully upon the track of a railroad. It would add materially to the public safety were there a similar law here": *Mulherrin v. Delaware R. R. Co.* 81 Pa. St. 366.

While it is true that the company owes no duty to a trespasser, and is entitled to assume that its track is clear, except at public crossings, or other places which the public frequents, of which it has knowledge, it is not meant that he may be run down, or that a wilful or wanton injury inflicted upon him would be justifiable. The fact that a person may be a trespasser when using a railroad track as a sidewalk will not justify the infliction of injury as a punishment, or out of recklessness. After the

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company discovers the trespasser, it becomes its duty to use care and diligence commensurate with the danger of his position. But the company is no more bound to keep a lookout for a trespasser than it would be to furnish appliances for his benefit as such. "The company," said ZOLLARS, J., "at all times owe a duty to passengers upon its trains to keep a lookout for obstructions upon the track, and if it fail to do so, and by reason of such failure a passenger suffers injury, the company is liable on the ground of negligence. But it cannot be said with reason that it owes such duty to one trespassing upon the track. As to him it is not bound to anticipate such intrusion, and is not liable if a collision occurs without its knowledge": *Terre Haute R. R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719. It is therefore not a part of the duty of a railroad company, in exercising ordinary care in the operation of its trains, to provide against the possibility of trespassers being on its track. This being so, the company is not bound to anticipate their presence, or to take precautions for their safety, nor is it liable for injury to such trespassers if a collision occurs without its knowledge.

In *Woodruff v. Northern Pac. R. R. Co.* 47 Fed. 689, it was held that it was not wilful negligence in the engineer not to see a trespasser on the track, though, by ordinary care and diligence he might have discovered him in time to have avoided the injury. In that case the complaint charged that the child, being twenty-two months old, went upon the track and was run over by a passing train, and so injured as to be crippled for life, and that the engineer could have seen the child on the track in time to have stopped the train and averted the disaster, and that the failure to see the child and stop the train was negligence. Upon demurrer, these facts were held insufficient to constitute a cause of action. HANFORD, J., said: "The

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defendant was not bound by any contract with the plaintiff to take care of, or provide for the safety of, his infant, and owed no duty to look out for intruders upon its track, on ground dedicated and reserved for its exclusive use as a right of way. The complaint does not charge that the child was enticed or licensed by the defendant to come upon its track, nor that the place where the injury happened was at a public crossing, or within a public highway, nor that the defendant's servants, after seeing the child, intentionally or wantonly committed the injury; and without one or the other of these elements, or something equivalent thereto, I cannot regard the defendant's conduct as being morally culpable or legally wrong, so as to give rise to a legal claim for damages." A like principle is announced in *Givens v. Kentucky Cent. Ry. Co.* 15 S. 1057, where a boy nine years old was killed by a locomotive backing upon him when he was on the track at a place where the company had the exclusive right of way. HOLT, C. J., said: "The deceased was in fact a trespasser, and those in charge of a train are, under such circumstances, ordinarily not required to keep a lookout, and guard against danger to such a person. They are not required to presume that any one will trespass upon the exclusive right of way of the company; and they are therefore not bound to look out for them, but only to avoid injury to them, if possible, when their presence and liability to danger become known. This rule applies in the case of a child just as it does in that of a grown person. If those operating a train were required to look out and guard against danger to children trespassing upon the track, then this would necessarily afford an opportunity to see all other persons who might be upon it, and in danger. Undoubtedly, a greater degree of care is required of them as to children not old enough to be aware of the danger than as to grown persons, when they have been

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once discovered upon or near the track; but until their presence is known the rule applies equally to both. An exception to this rule exists, however, where a train is passing through a town or city, and where people are likely to cross the track at any point, and are known to be in the habit of doing so by those operating the train. In such a case there is constant danger to life; and out of regard for it, those in charge of a train must look out for persons who may be upon the track, and give such notice of its approach and movements, and so regulate its speed, as is likely to warn them of danger, and enable them to get out of the way." For further reference see notes to Am. & Eng. Enc. title "Railroads," pages 935-937, and notes to *Philadelphia R. R. Co. v. Troutman*, 6 Am. & Eng. Ry. Cas. 117-120.

The principle to be deduced from these authorities is that a railroad owes no duty of keeping a lookout for persons on its track, where it is entitled to have it clear, and that as to such it is not liable if a collision occurs without its knowledge. If, therefore, the plaintiff's son was a trespasser upon the company's track, the failure of the engineer on the approaching train to discover him, by reason whereof the accident happened, was not negligence, as the defendant owed the deceased no legal duty to keep a lookout.

3. Now, the facts show that the plaintiff's son was found dead, and that his death was the result of a collision with the train upon the track of the defendant at a place where the railroad company was not bound to anticipate his presence, and where he was a trespasser, and that those operating the train had no knowledge of the fatal occurrence until they were informed by telegraph, after they had reached the city of Roseburg. Assuming, then, that plaintiff's son was on the track, and that the engineer could have discovered him in time to

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have stopped the train, if he had kept a lookout, his failure so to do would not render the company liable for neglect to perform any duty it owed him within the principle of the authorities cited, except *Houston R. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632, where the fact appeared that the plaintiff was lying on the track, and that the engineer could have discovered him in time to have stopped his train without running over him. But in the case at bar, there is no evidence showing that the deceased was on the track when killed, other than the inference from the finding of the body, or, if so, how he came to be there, or how long he had been there when struck by the train, or whether he was on the track a sufficient length of time before the collision, or entered upon it a sufficient distance ahead of the train, so that he could have been seen or discovered by those operating it in time to have avoided injuring him. For aught that appears from the evidence the boy may have come in sudden contact with the train in such a way that his presence might not be discovered by the most vigilant "lookout." However this may be, the circumstances attending his death are not known, except that it resulted from collision with the locomotive, which is evidenced by his body having been found on the track. Whether he was on the track, though it was straight and clear, a sufficient length of time before the collision so that the engineer on the lookout could have seen him in time to have averted the disaster, is not shown by the evidence. While we recognize the rule that, if there is any evidence tending to show negligence upon the part of the company or its employés, or from which an inference of it might be fairly drawn, or about which different men might draw different conclusions, such evidence should be left to the jury, unless it should appear that the accident would not have happened but for the con-

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tributory negligence of the party, we do not think the evidence for the plaintiff shows a case of negligence sufficient to be submitted to a jury. In view of these considerations, it is not necessary to consider whether the plaintiff was guilty of contributory negligence. It results that the motion for nonsuit should have been allowed, and that the judgment must be reversed.

REVERSED.

[Argued January 31; decided March 13, 1904.]

CLARK v. WICK.

[S. C. 36 Pac. 165.]

1. **PARTNERSHIP—PLEADING.**—Where an action on an implied contract for goods furnished by a firm is brought in the name of the partners, and it is alleged that they jointly furnished the goods, it is not necessary to allege the partnership.
2. **PAYMENT—GENERAL DENIAL.**—Under a general denial no proof of payment can be received. *Benicia Agricultural Works v. Creighton*, 21 Or. 495, referred to.

APPEAL from Linn: GEO. H. BURNETT, Judge.

This is an action by Clark Brothers against Philip Wick on an implied contract for board and feed furnished the defendant by plaintiffs, and on certain accounts for labor performed for defendant by one Cree and one Fitzwater, and by them sold and assigned to plaintiffs. In the title of the cause plaintiffs are designated as "James E. Clark and Charles Clark, partners doing business under the firm name and style of Clark Brothers," but there is no allegation in the body of the complaint of such partnership, or that the accounts sued on are partnership accounts. A demurrer to the complaint being overruled, defendant answered, denying specifically all the allega-

25	446
35	193
25	446
37	841

25	446
45	482

25	446
47	506

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tions of the complaint, and upon the issue thus joined a trial was had, resulting in a judgment in favor of plaintiffs, from which defendant prosecutes this appeal.

AFFIRMED.

Mr. Geo. E. Chamberlain (Messrs. *J. K. Weatherford* and *J. R. Wyatt* on the brief), for Appellant.

Mr. N. M. Newport (*Mr. J. J. Whitney* on the brief), for Respondent.

Opinion by MR. JUSTICE BEAN.

1. The first assignment of error is in the admission of evidence tending to show that plaintiffs furnished board for the defendant and feed for his stock, as alleged in the complaint, and that they purchased the Cree and Fitzwater accounts as partners under the firm name of Clark Brothers. The objection to the admission of this testimony is based upon the fact that there is no allegation of partnership in the body of the complaint. Conceding that the words "partners doing business under the firm name and style of Clark Brothers" in the title of the cause are mere *descriptio personarum*, and not a sufficient allegation of partnership, we are still of the opinion that there was no fatal variance between the allegations and proof. The complaint alleges an implied promise in favor of plaintiffs, jointly, arising on account of board and feed furnished defendant, and of certain accounts against him, purchased and owned by them, and the answer simply puts these allegations in issue. It is therefore immaterial in this case whether such cause of action accrued to them as joint owners or as partners. In either case they were the joint promisees, and the only parties having an interest in the cause of action; and, had the plaintiff alleged a part-

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nership, an issue upon that alone would be immaterial, and plaintiffs would have been entitled to judgment on the pleadings: *Millerd v. Thorn*, 56 N. Y. 402; *Walga-mood v. Randolph*, 22 Neb. 493, 35 N. W. 217. An allegation of partnership is only necessary when the cause of action depends on its existence: *Abbott's Trial Evidence*, § 203; *Loper v. Welch*, 3 Duer. 644. If the action is brought on an obligation made payable to a partnership in its firm name, it is, of course, necessary to allege the partnership, that plaintiffs compose the firm, and that the contract was made by them in that name. Of this character are the cases cited by counsel for the defendant. But in this case the action is not founded on a contract made payable to or in the name of a firm, but on an implied promise in favor of plaintiffs jointly. It follows that, whatever the particular interests of the plaintiffs may be therein, as between themselves, the defendant could not have been misled or in any way injured by the introduction of the testimony objected to. The gist of the complaint is that plaintiffs furnished defendant board for himself, and feed for his stock, for which they have not been paid, and that they own the claims of Cree and Fitzwater for labor performed for defendant, and to these allegations the evidence was directed. The right to maintain the action does not depend upon a partnership between the plaintiffs, and proof that jointly they furnished to defendant the board and feed, and purchased the accounts against him, as alleged in the complaint, and that he thereby became indebted to them, is sufficient, and hence the question as to whether they were at the time copartners or simply joint owners is wholly immaterial: *Wood v. Fithian*, 24 N. J. L. 33. There was, therefore, no error under the pleadings in this case in the admission of the testimony.

2. The only other assignment of error noted by coun-

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sel in his brief is, as stated by him, "whether or not defendant, under his answer, would be entitled to show that he had performed sufficient labor, under the terms of the contract introduced in evidence, to pay the claim sued upon." As the contract referred to appears to be in writing, and neither it nor the particular portion thereof material to the question presented is in the record, there seems to be nothing here for our consideration. But if the position of defendant is, as the brief indicates, that under a general denial he had a right to prove payment of the amount sued on, either in money or labor, the question has been answered in the negative by this court in *Benicia Agricultural Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676. Finding no error in the record the judgment must be affirmed. **AFFIRMED.**

[Argued February 7; decided March 13, 1894.]

CITY OF SALEM v. MARION COUNTY.

[S. C. 26 Pac. Rep. 163.]

1. **HIGHWAYS—ROAD TAXES—RIGHTS BETWEEN CITY AND COUNTY.**—Under § 4061, *et seq.*, providing for levying and collecting road taxes and for working the public roads by the county, and section 36 of the charter of the city of Salem, providing that the jurisdiction of the county court upon such subject shall not extend to the city of Salem, and that the street commissioners of such city shall have the power to enforce the payment of such taxes levied within its limits, and shall work them upon its streets, the city is entitled to such taxes levied upon the citizens within its limits.
2. **IDEM.**—Where a sheriff collects taxes belonging to the city and collectible by its officers, and pays the same into the county treasury, the city may sue the county to recover the same.

APPEAL from Marion: GEO. H. BURNETT, Judge.

This is an appeal from a judgment of the circuit court of Marion County, dismissing a writ of review

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issued by said court at the instance of plaintiff to review the proceedings of the county court in disallowing and rejecting a claim presented by said plaintiff for three thousand seven hundred and sixty-three dollars and ninety-seven cents, being the amount collected by the defendant from the taxable property within the corporate limits of the city of Salem and the inhabitants thereof as road taxes. The record discloses, in substance, that the county court of said county, at the January term, eighteen hundred and ninety-two, levied and collected a road tax of two mills on the dollar upon all the taxable property in Marion County, including the taxable property within the corporate limits of the city of Salem, and also assessed and collected a poll tax of two dollars upon every person who was liable to pay a state poll tax within said county, including the inhabitants of said city; that the sum of three thousand four hundred and seventy-seven dollars and ninety-seven cents, as road taxes, and two hundred and eighty-six dollars as poll taxes, so assessed, was collected from the inhabitants of said city; that by virtue of section 36 of an act of the legislature entitled "An act, etc., to incorporate the city of Salem," known as the charter of said city, and an act supplemental thereto, etc., the said city became entitled to all the road tax, either in work or money, due from the inhabitants of said city, or assessed upon the taxable property within the corporate limits of the same; that at the October term of the county court in eighteen hundred and ninety-two, the plaintiff presented its claim for said sum of three thousand four hundred and seventy-seven dollars and ninety-seven cents, and the sum of two hundred and eighty-six dollars, and asked said court to award the plaintiff a warrant on the treasurer of Marion County therefor, and that such court disallowed and rejected said claim; that thereafter the plaintiff sued out a

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writ of review, whereby it removed the proceedings of the county court upon its claim to the circuit court of said county for review, where, after due consideration, it was adjudged that the writ be dismissed and that the defendant recover its costs and disbursements, from which the plaintiff appeals. REVERSED.

Messrs. D'Arcy & Bingham, for Appellant.

Mr. James McCain, District Attorney, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

1. The plaintiff claims that it was entitled to these taxes by virtue of section 36 of its charter, which is as follows: "The power and authority given by general law of the state to the county court of Marion County to divide said county into road districts, to appoint road supervisors, to lay out or work highways, to license the sale of liquor, and to grant ferry licenses, shall not apply or extend to the territory within the limits of the city of Salem; but said territory and the inhabitants thereof are hereby excepted out of the jurisdiction of said court upon said subjects; *provided, however*, that the street commissioner shall work the county road tax due from the inhabitants of the city on the streets, alleys, and bridges thereof after the manner prescribed by general law for road supervisors, and he shall have the same power and authority to enforce the payment of such road tax in work or money as provided in such general law for road supervisors." By subdivision 4 of section 4085 of Hill's Code, it is provided that "In counties containing ten thousand inhabitants or over, the county court of such county in the state, at the time of levying taxes for county purposes, may levy a tax upon all the taxable property in its county, not to exceed two mills upon the dollar, and in addition thereto a poll

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tax of two dollars to be assessed upon every person who shall be liable to pay a state poll tax, which tax shall be collected with and at the same time and in the same manner as county taxes shall be collected, and shall be paid into the county treasury, and shall be kept as a separate fund to be known as the road fund, and shall be used for the purpose of laying out, opening, making, and repairing county roads and building and repairing bridges. Whenever the county court of any county shall levy a tax as aforesaid, no other tax nor other taxes for the purposes in this section mentioned shall be levied or collected. Such county court shall annually make an apportionment of the taxes so collected among the several road districts in the county, and direct the amounts so apportioned to be paid to the supervisors of roads therein. In making the apportionment the court shall have a due regard to the amount of taxes collected in the several road districts, to the condition of the roads and necessity for repairs, and to the amount of travel thereon."

Under the general law the county court is authorized to divide the county into road districts, to appoint road supervisors, and to repair and work the roads or highways, etc.: Hill's Code, § 4061, *et seq.* By subdivision 4 of section 4085, in counties containing ten thousand inhabitants or over, the county court is invested with jurisdiction to levy and collect a road tax not to exceed the amount specified therein, and, in addition thereto, a poll tax for road purposes in the same manner and at the same time as county taxes, which shall be paid into the county treasury and kept as a separate fund, and apportioned to the several road districts of the county in the manner therein indicated. As Marion County, in which the city of Salem is located, is a county containing over ten thousand inhabitants, all portions of it, including the territory of the city of Salem, are subject to the jurisdic-

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tion of the county court, except as qualified and limited by section 36 of the city charter. Under this section the territory comprising the corporate limits of the city of Salem is excepted out of the jurisdiction of the county court in respect to "the power and authority given by the general law of the state to the county court of Marion County to divide said county into road districts, to appoint road supervisors, to lay out or work highways," etc., thereby leaving the jurisdiction given in subdivision 4 of section 4085 of the general law to the county officers, unaffected so far as the levying and collecting road taxes within the corporate limits of the city of Salem is concerned, except as qualified and limited by the proviso in said section 36 of its charter. This proviso requires that the street commissioner, who is an officer of the city, "shall work the county road tax due from the inhabitants of the city on the streets, alleys, and bridges thereof after the manner prescribed by the general law for road supervisors, and he shall have the same power and authority to enforce the payment of such road tax in work or money as provided in such general law for road supervisors." By reference to the general law it will be found that the road supervisors are invested with authority to cause the road tax to be worked out, or to enforce its payment in money, and are, therefore, the collectors of such road tax; and as the street commissioner, under this proviso, is invested with the same authority, he is the collector of the road taxes, levied by the county, upon property within the city, and not the sheriff of the county. So that the effect of section 36 of the charter, is to limit and confine the jurisdiction of the county court under subdivision 4 section 4085 of the Code over the territory of the city to levy road and poll taxes as therein provided, leaving to the street commissioner the collection of such

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taxes, and hence the collection of them by the sheriff, and the payment of the same to the treasurer of the county, was without authority of law, and the county is bound to refund it to the party lawfully entitled to it. As a consequence, upon the facts as disclosed by this record, the county court, although it had jurisdiction to assess and levy the road taxes in question upon the property and inhabitants of the city, the sheriff of the county had no authority to collect such taxes and pay them into the county treasury, but the duty of attending to the collection of the same devolved upon the street commissioner, who is an officer and agent of the city, and consequently the county has no lawful right to such taxes.

2. The principle that an obligation rests upon all persons, natural and artificial, to do justice, so that if a county obtain money or property of others without authority the law, independent of any statute, will compel restitution or compensation, is not questioned: *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62. But it is claimed that there is no privity, statutory or contractual, between the county and city which would sustain an action for money had and received, and hence the county would not be justified in paying over the money in question to the city. As the street commissioner is an officer of the city, and as such authorized to collect such taxes, he is the agent of the city for their collection, and whether collected in work or money, such work must be performed or money expended upon the streets, alleys, or bridges of the city for the benefit of its inhabitants. The city, therefore, has the right to this money in order that it may be applied to the improvement and repair of its streets and bridges as the law directs. For these reasons, we think that the judgment of the circuit court dismissing the writ and awarding costs and disbursements to the defendant must be re-

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versed and the cause remanded for further proceedings not inconsistent with this opinion, and it is so ordered.

REVERSED.

[Argued January 23; decided April 3, 1894.]

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WADE v. CREIGHTON.

[S. C. 36 Pac. 209.]

1. **BILLS AND NOTES—INDORSEMENT BEFORE DELIVERY.**—Third persons who indorse notes before delivery are original promisors, and as the form of the note is joint or several, so will be their liability.*
2. **IDEM.**—Under the established rule in Oregon a third party who indorses a note at the time of its execution and before delivery is *prima facie* a second indorser, the presumption being that he did not expect to incur any liability until the payee had indorsed (*Kamm v. Holland*, 2 Or. 59; *Cogswell v. Hayden*, 5 Or. 23; *Deering v. Creighton*, 19 Or. 120); but where such an indorsement is made to give the maker credit with the payee, and the indorser waives protest, demand, and notice of non-payment, he will be considered as a first indorser, and may be sued as such.

APPEAL from Benton: J. C. FULLERTON, Judge.

The complaint in this case contains ten separate causes of action, based on ten certain promissory notes, all which causes are stated in the same language, except as to the dates, amounts, and names of the makers of the several notes. Each note is indorsed by the defendants, who are strangers thereto, which indorsements were made before such notes were delivered to the payees therein, and read as follows: "Creighton & Quivey, agents. For value received we hereby waive protest, demand, and

*NOTE.—The numerous cases on the question of the nature of the liability of a stranger who indorses commercial paper before delivery are brought together and analyzed in a note to *Fullerton v. Hill* (Kan.), 18 L. R. A. 33.—REPORTER.

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notice of nonpayment. Creighton & Quivey." The complaint alleges, in substance, that the defendants, in consideration of certain goods delivered to them to be sold and accounted for, thus indorsed said notes, and delivered the same to the plaintiffs, and that plaintiffs accepted them from the defendants, in payment for such goods, relying upon the credit of the indorsers, and not upon the credit of the makers. The defendants interposed a demurrer to each cause of action upon the ground that there is a defect of parties, in that the makers of the several notes are necessary and proper parties defendant, which demurrer being overruled, and the defendants refusing to further plead, the court gave judgment for plaintiffs, from which this appeal is taken.

AFFIRMED.

Messrs. Lawrence Flinn and Charles E. Wolverton (Mr. J. W. Rayburn on the brief), for Appellants.

Mr. J. R. Bryson (Mr. W. S. McFadden on the brief), for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

It appears that the demurrer is founded on the assumption that, upon the facts alleged, the defendants became, by their indorsement, joint makers of the several notes, and that as such they cannot be sued without joining the other makers and payees as defendants. This is put upon the ground that if, by their engagement, the defendants are to be deemed joint makers, logically each instrument must be deemed a joint note as to them, notwithstanding they may be joint and several in form; and hence that an action cannot be maintained upon them against the defendants without joining the makers thereof and payees. But this is not so. When it is said

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that a third party who indorses a promissory note at its inception to give it credit with the payee is a joint maker, it is meant that his liability is the same as if he had signed the note upon its face below the maker's name. As his contract takes effect simultaneously with that of the party who signs the note upon its face, and the right of the payee inures against each at the same time, he is, in legal contemplation, an original promisor, and, as such, deemed a joint maker. The phrases "original promisor," and "joint maker" in such cases are generally used interchangeably, to denote the liability assumed by the contract. Referring to these anomalous indorsements, Mr. Justice STORY says: "As he who signs on the face, and he who indorses his name on the back, both promise to do the very same thing, to wit, to pay the money at the specified time, they may, without doing violence to the contract, be deemed as joint makers; and as, in point of form, each promises for himself, the undertaking may be treated as several, as well as joint": Story on Promissory Notes, § 469. The authorities which hold that a third party who signs his name on the back of a negotiable promissory note is a maker and original promisor, also hold that his liability is the same as it would have been had he signed such note upon its face. Upon this point Mr. Justice CLIFFORD says: "They placed their names there at the inception of the note, not as a collateral undertaking, but as joint promisors with the maker, and are as much affected by the consideration paid by the plaintiff, and as clearly liable in the character of original promisors, as they would have been if they had signed their names under the name of the other defendant upon the inside of the instrument": *Rey v. Simpson*, 22 How. 341. Can there be any doubt, if the defendants in the case at bar had signed their names under the names of the ostensible makers of the

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several notes mentioned, that the measure of their liability would be joint, or joint and several, according to the tenor of the notes? To give their contract a different effect would ignore its terms. As all the notes sued on, with one exception, are joint and several in form, the defendants, with the exception noted, are jointly and severally liable upon them, and hence they may be sued alone or without joining the makers as parties defendant. In cases of this sort, where a party writes his name on the back of the note, "his signature," as Mr. Justice CLIFFORD observes, "binds him in the same way as if it was written on the face of the note, and below that of the maker; that is to say, he is held as a joint maker, or as a joint and several maker, according to the form of the note": *Good v. Martin*, 95 U. S. 90. This being so, if we should concede that the defendants, by their undertaking, upon the facts alleged, assumed the liability of original promisors or joint makers, we must look to the form of the notes themselves to determine the nature of their liability. In this view it would result, if we should treat the defendants as joint makers, as counsel did by their demurrer, that the objection raised is without merit.

But are the defendants joint makers? The contention of their counsel is that, in view of the similarity of the facts alleged in the case at bar to those alleged in *Deering v. Creighton*, 19 Or. 120, 20 Am. St. Rep. 800, 24 Pac. 198, they are justified in assuming that the defendants are joint makers of the several notes sued on. This is a misapprehension. In that case the trial court held that, upon the facts as alleged in the reply, the defendants were joint makers of the note, and as such allowed a recovery against them, while the facts as alleged in the complaint, under our adjudications, showed that they were presumptively liable as second indorsers. Such being the state of the

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case, if we were to adhere to our previous adjudications and follow the authorities upon which they were based to the logical conclusions announced by them, we would be bound to hold that, where the facts disclose that the note was indorsed before delivery for the purpose of giving the maker credit with the payee, the defendants are liable as first indorsers. Hence, within the purview of our adjudications, if the facts set out in the reply disclose such a case, and could be used to aid the complaint, the defendants would not have been liable as joint makers, and the plaintiff could not recover against them as such, as the trial court held. In this view, the reply was inconsistent with the complaint, which upon its face established a different liability. While all the courts agree that a liability is incurred by a third party who signs his name upon the back of a negotiable promissory note at the time it is made, there is a perplexing difference in their opinions as to whether he should be regarded as a joint maker, guarantor, or indorser. There is little doubt that the weight of authority is that a third person who indorses a note at the time of its execution and before its delivery to the payee will be presumed to be an original promisor or joint maker: Lawson, Rights, Remedies, and Practice, § 1575; Tiedmann on Com. Paper, §§ 270, 272.

2. But in this state the theory that such an indorser is a joint maker, guarantor, or first indorser is rejected, and the party is held *prima facie* liable as a second indorser, for the reason that, in the absence of explanation, the presumption is that he did not expect to incur liability until the payee had first indorsed. In *Cogswell v. Hayden*, 5 Or. 23, the court say: "The only presumption that can arise from Cogswell's indorsment is that he intended to become second indorser," and in support thereof quote the language of BACON, J., that "it must be supposed, in the absence of any proof to the contrary,

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that perceiving the name of the payee in the note, he indorsed it on the presumption that the name of such payee, to whose order it was made payable, would also, at some time, appear upon the note; for only thus would it become negotiable": *Bacon v. Burnham*, 37 N. Y. 616. The rule as settled in New York, that one, other than the maker, who indorses a negotiable promissory note, is presumptively a second indorser, was adopted in this state in *Kamm v. Holland*, 2 Or. 59, was followed in *Cogswell v. Hayden*, 5 Or. 23, and regarded as settled in *Deering v. Creighton*, 19 Or. 120, 20 Am. St. Rep. 800. It is likewise held in that state that, where the note is indorsed by a third party, before delivery, for the purpose of giving the maker credit with the payee, the latter may hold him liable as the first indorser, but not as guarantor or maker: *Coulter v. Richmond*, 59 N. Y. 479; *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326, *Spies v. Gilmore*, 1 N. Y. 321; *Hall v. Newcomb*, 7 Hill, 416, 42 Am. Dec. 82. As the facts show, the defendants indorsed the note before delivery, to give the maker credit with the plaintiffs as payees, unless we ignore the authorities upon which our previous adjudications are based, and the conclusions to which they lead, we are bound, logically, to hold that the defendants are liable as first indorsers. Mr. Daniel, after showing how diversified and contradictory are the views generally held by the different courts in this country, expresses the opinion that "the party who puts his name on the back of a negotiable note before it is indorsed by the payee, should be presumed to be a first indorser": *Daniel on Negotiable Instruments*, § 714.

While, therefore, we have adopted the New York adjudications in holding that where a third party indorses a note before its delivery to the payee, he is presumptively a second indorser, and entitled to the rights, privileges,

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and immunities incident to that situation, and, therefore, *prima facie*, not liable to such payee, but only to subsequent indorsers, yet it seems to us, if we are to be consistent, that we should also hold with the New York adjudications that, where the facts alleged show that the payee took the note from, and gave credit or parted with value to, the maker, with the knowledge of the indorser, and upon the faith of his indorsement, he is liable as a first indorser, and that an action may be maintained by the payee against such indorser upon the note. This view certainly would give significance to the words of the indorsement, "We hereby waive protest, demand, and notice of nonpayment," above the signatures of the defendants, and from which it would seem that the defendants assumed towards the plaintiffs the relation of indorser and indorsee, and waived demand and notice. By no other construction can we give force and effect to the language of such indorsement. As the facts and contract under which the notes were signed on the back by the defendants are set out, it is manifest that they intended in some way to become liable to the plaintiffs for the payment of the notes, and consequently that we must construe them so as to give effect to all its terms and provisions. In doing this, the interpretation ought to be just such as carries into effect the intention of the parties, so that the obligors may be bound according to their agreement. While the facts are such that, by the weight of authority, the defendants may be deemed liable as original promisors, and joint, or joint and several makers, according to the form of the note, it seems to us, in view of the language of the indorsement, and the interpretation of similar contracts under the New York adjudications to which we have alluded, that we must hold the defendants liable as first indorsers to the plaintiffs. Such being the case, it results, so far as the defendants are con-

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cerned, in either view, that it is not necessary to join the makers as parties, and that the judgment therefore will be affirmed.

AFFIRMED.

[Argued February 20; decided April 17, 1894.]

BRANSON v. GEE.

[S. C. 24 L. R. A. 355; 36 Pac. 537.]

EMMENT DOMAIN—TAKING ROAD MATERIAL—DUE PROCESS OF LAW*—

CODE, §§ 4092, 4093.—Section 4092, Hill's Code, authorizing road supervisors to summarily take materials needed for the public roads, and section 4093, providing that a party aggrieved in such cases may apply to the county court and have his damages assessed, are not unconstitutional as taking property without due process of law; for under section 18 of article I. of the state constitution, compensation need not be made before taking property for the use of the commonwealth, and the provisions of section 4093 afford abundant opportunity for a hearing on the question of damages. In such cases the county court, composed of the supervisors and the county judge, acts judicially, and must be deemed an impartial tribunal. *Kendall v. Post*, 8 Or. 144, approved and followed.

APPEAL from Yamhill: GEO. H. BURNETT, Judge.

This is an action by Eli T. Branson against Henry Gee, to recover damages, alleged to have been caused by the defendant's entering upon the plaintiff's lands described in the complaint, digging and taking gravel therefrom, and leaving the fences open, so that cattle entered upon and destroyed his pasture. The defendant, after

*NOTE.—In respect to due process of law in taking property of individuals for public use, see also *Scott v. City of Toledo*, 1 L. R. A. 688. As to notice and an opportunity to be heard in proceedings to take or burden property, see *Re Bonds of Madera Irrigation District*, 92 Cal. 296, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673; *State v. Stewart*, 74 Wis. 620, 6 L. R. A. 394; *Speer v. Mayor of Athens*, 85 Ga. 49, 9 L. R. A. 402; *Ulman v. Mayor of Baltimore*, 72 Md. 587, 11 L. R. A. 224.—REPORTER.

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Argument of counsel.

denying the allegations of the complaint, set up as a separate defense thereto that Yamhill County was and is a duly organized county of the state of Oregon; that during all the time mentioned in the complaint the defendant was the duly appointed, qualified, and acting supervisor of the road district in which plaintiff's lands are situated, and that two legally established county roads ran over and upon said lands; that the laying down of the fences as alleged was for the purpose of obtaining access to a bed of gravel situated on such lands; that the gravel therein was necessary to repair said county roads, and that such entry was for the purpose of securing it to be used thereon; that the gravel alleged to have been dug and hauled away was so used; that the laying down of the fences and the digging and carrying away the said gravel was done in a prudent and careful manner, without unnecessary damage, and that Yamhill County is liable for such damage as the plaintiff may have sustained thereby, and not the defendant. To defendant's separate defense the plaintiff demurred, alleging that it did not state facts sufficient to constitute a defense to the action. The demurrer being overruled by the court, the plaintiff refused to plead further, whereupon the court rendered a judgment dismissing the action and awarding the defendant costs and disbursements, from which judgment the plaintiff has brought this appeal.

AFFIRMED.

Mr. John J. Spencer, for Appellant.

It is too well established to admit of controversy that there can be no judicial determination without notice to the parties whose rights are to be determined; for without notice there can be no jurisdiction and no due process of law: Elliott on Roads and Streets, 150-152,

Argument of counsel.

Bertholf v. O'Reilly, 74 N. Y. 519; *Stewart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

There is much reason embodied in the argument in many of the decisions that the landowner is entitled to impartial triers, and of necessity is entitled to an opportunity to ascertain whether they are impartial. If there is a right of appeal to a court of general jurisdiction, then there is an opportunity for an impartial hearing under the general rules of law, and no substantial injustice is done; but if there is no such right, then it is a violation of sound principle to compel a party to be bound without an opportunity to discover whether the tribunal is or is not impartial. It is difficult to conceive how there can be due process of law where no opportunity is afforded the property owner to inquire into the fitness or qualifications of those who are to decide upon his property rights, and it seems to us it is not within the power of the legislature to take from the citizen any essential element of the great right included in the constitutional provision securing to the citizen due process of law: *Elliott on Roads and Streets*, 241; *Cooley on Constitutional Limitations*, 695; *Langford v. Ramsey Co.* 16 Minn. 380. If these authorities are to be relied upon, if the reasoning in them is to be accepted, then it follows that in cases like this the question of compensation must be submitted to a tribunal clothed with judicial power; that the person whose property has been taken must have notice of the pendency of the proceedings, and that he must at some time before final determination have a right to question the partiality of the tribunal. As the statute providing for the taking of stone and gravel from the citizen for use upon the public roads makes no provision for notice to the owner of the private property so taken, and makes no provision for ascertaining the impartiality of the triers, it must be so invalid as to constitute no defense to an action like this.

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The case of *Kendall v. Post*, 8 Or. 141, is not decisive of the present controversy, for the questions now raised were not decided in that case. It is also worthy of note that the cases cited by Judge KELLY in that decision were all made before the adoption of the fourteenth amendment to the constitution of the United States requiring due process of law to be observed when private property is taken for public use.

Messrs. Irvine & Coshaw, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

Our statute makes it the duty of supervisors to keep the roads in their districts open and in good repair, and to enable them to do so they are authorized by section 4092, Hill's Code, "to enter upon any lands adjoining or near the public road, and gather, dig, and carry away any stone, gravel, or sand * * * necessary for the making and repair of any public road in their district" and section 4093 provides that "if any person shall feel aggrieved by the act of any supervisor cutting or carrying away timber or stone as aforesaid, he may make complaint thereof in writing to the county court at any regular meeting within six months after the cause of such complaint shall exist, and such court shall proceed to assess and determine the damages, if any, sustained by the complainant, and cause the same to be paid out of the county treasury." The plaintiff contends that these provisions of the road law are unconstitutional and void, because (1) they do not provide for giving notice to the owner whose property is taken, nor (2) for his participation in the selection or formation of the tribunal upon which is devolved the duty of assessing his damages. Lands for highways, as well as timber, stone, and gravel with which to make, improve, or repair them, are taken

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by right of eminent domain: Cooley, Constitutional Limitations, 657. By the constitution of this state it is provided that private property shall not be taken for public use without just compensation, and, except in case of the state, without such compensation first assessed and tendered: Article I., section 18, Constitution of Oregon. Under this provision the private property of the citizen cannot be taken against his will for any purpose other than a public use, nor, except in case of the state, without just compensation first assessed and tendered. With the state it is not a condition precedent that the compensation should precede or be concurrent with the taking of private property for public use. It may appropriate such property without compensation being first assessed and tendered, but it must make provision by which the party whose property has been seized can obtain just compensation for it. Nor is this all; when the public exigencies demand the taking of private property for public use, it must be done by due process of law. The constitution of the United States provides that the "state shall not deprive any person of life, liberty, or property, without due process of law": Article XIV., section 1, Amendments. "Due process of law," EARLE, J., said, "is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature," and that, generally stated, it meant "an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights": *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289. Consistent with these principles, the property of a citizen cannot be taken by the power of eminent domain without some notice to the owner, or some opportunity being afforded him, at some stage of the proceeding, to be heard as to the compensa-

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tion to be awarded him. When the public appropriates property to improve or repair a public highway, the owner is entitled to a hearing as to the compensation which he is to receive. Upon the question of compensation, Mr. Lewis says: "All the authorities agree that the owner is entitled to be heard as a matter of right, and consequently that he is entitled to such notice as will give him an opportunity to be heard": Lewis on Eminent Domain, § 366. While, therefore, the state, when taking private property for a public use, or a county by its authority, is not bound to make or tender compensation before its actual appropriation, yet, as the citizen cannot be arbitrarily deprived of his property, it must make provision by law whereby the owner can have a hearing or be heard before an impartial tribunal as to the just compensation to be awarded him.

By section 4093, Hill's Code, the state has afforded an opportunity to any person aggrieved by the act of any supervisor in entering upon his land and carrying away gravel, etc., pursuant to the provisions of section 4092, to be heard, and his grievance considered by the county court, which is clothed with ample power to determine and assess his damages, and cause the same to be paid by the county upon complaint in writing of the person so aggrieved. This provision undeniably affords an opportunity for the party aggrieved, whose property has been taken by the supervisor, to propound his claim for compensation, and the fact that this duty devolves upon him as a preliminary step is no objection to its validity or constitutionality. It not only affords a remedy to which the party aggrieved can resort to have his compensation determined and assessed, but also provides adequate means for its satisfaction or payment out of the county treasury without risk of loss. Hence it clearly appears that he has an opportunity to be heard as to the just

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compensation which is to be awarded to him, and that he is not deprived of his property without due process of law.

But it is claimed that the owner of property taken for public use is entitled to participate in the selection of the tribunal to assess his damages, as otherwise he might be denied a fair and impartial trial, and thus deprived of the just compensation guaranteed him by the constitution. It is no doubt true that the compensation must be determined by an impartial tribunal, but, as Mr. Elliott says, "the character of the tribunal, and the manner in which its members are selected, is a matter to be determined by the legislature, except where the constitution directs how the tribunal shall be selected and what its character shall be": Elliott on Roads and Streets, 214-217. As to how the tribunal to assess the damages shall be formed, it is not necessary that the owner of the property to be affected shall be consulted. A court or judge, with or without a jury, is an impartial tribunal: Lewis, Eminent Domain, § 313. In the case at bar the county court—composed of the judge and county commissioners—is the tribunal authorized by law to determine and assess the damages, and, when engaged in the transaction of such business, exercises judicial functions, and must be regarded as an impartial tribunal. In *Kendall v. Post*, 8 Or. 144, it was held that a party aggrieved by the acts of a supervisor who had taken stone from his land to repair the highway, must resort for redress to the county court while transacting county business, to determine and assess his damages, and that the statute was not unconstitutional because it authorized such court to assess the damages without a trial by jury. As the state, by the right of eminent domain, may take from adjoining lands, gravel or other suitable material for repairing public highways, and has provided an impartial tribunal for ascertaining and paying the damages suffered thereby, it

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results that the party affected must apply for redress to such tribunal and that the objections urged against the validity of the acts are not tenable. The judgment must therefore be affirmed.

AFFIRMED.

[Decided April 17, 1894.]

DICE v. McCAULEY.

[S. C. 26 Pac. 530.]

The plaintiff in an action to recover possession of a designated portion of the north half of a donation land claim makes out a *prima facie* case by introducing a patent to herself from the United States government to the north half of the claim, and the evidence of a surveyor that the true division line between the two halves of the claim was about thirty feet south of a designated house, where the answer alleges that the line described in the complaint as the north line of the tract in dispute was located by plaintiff and her husband as an agreed dividing line between the north half of the claim belonging to plaintiff and the south half belonging to her husband, which line is several rods north of such house.

APPEAL from Polk: GEO. H. BURNETT, Judge.

This is an action to recover possession of a certain portion of the north half of the donation land claim of E. C. Dice and wife, bounded, as described in the complaint, on the west by the Oregon & California Railroad Company's right of way strip, on the east by the east line of the donation claim, on the south by a line running east and west dividing the claim into equal parts, and on the north by "a line beginning at the west margin of a certain slough on said claim, and abutting the land now owned by one Dove in said claim; thence running south eighty-eight degrees west, at a distance of two chains north of the old dwelling-house situated on said claim; thence westerly along and following the center of a certain turning row and roadway, following the said

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center of said turning row and roadway to the east boundary line of one Rogers' land in said donation claim." The answer denied plaintiff's ownership and right to the possession, and for an affirmative defense averred (1) that the line described in the complaint as the north line of the tract in dispute, and which is particularly set out in the answer in the exact language of the complaint, was in 1869 established and located by the plaintiff and her husband as an agreed dividing line between the north half of the claim, which belonged to the plaintiff, and the south half thereof, which belonged to her husband, the predecessor in interest of the defendant; and (2) that defendant and her predecessors in interest are now and have been for more than ten years last past in the open, exclusive, and adverse possession of all of that portion of the donation claim lying south of such line, and that plaintiff has not been in possession thereof. The allegations of the answer were denied by the reply, and upon the trial the court sustained a motion by defendant for a nonsuit, on the ground that the plaintiff had not proven a case sufficient to be submitted to the jury, and this is the only question on this appeal.

REVERSED.

Messrs. Reuben P. Boise and Bonham & Holmes, for Appellants.

Messrs. Daly, Sibley & Eakin and W. S. McFadden, for Respondents.

Opinion by MR. JUSTICE BEAN.

To sustain the issues on her part, the plaintiff, after giving in evidence a patent from the government of the United States granting to her the north half of the donation land claim of E. C. Dice and wife, called as a wit-

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ness one W. P. Wright, a surveyor, who testified that he knew and had traced the line which the defendant by her answer claims to be her north line, and that it ran north of the dwelling-house, and is the same line described in the complaint as the north boundary of the land in controversy. Plaintiff also offered herself as a witness, and testified that she was acquainted with the land in controversy, and that it was a part of her donation claim; that it was in the possession of the defendants, and had been since September twenty-ninth, eighteen hundred and ninety; that before bringing this action she had the line dividing the north from the south half of the claim run by one T. W. Butler, county surveyor of Polk County, and that such line ran several feet on the south of the dwelling-house. Butler was called, and testified that he run the line dividing the north from the south half of the claim, and that such line as run by him passed about thirty feet south of the dwelling-house. This is sufficient of the evidence to show the grounds upon which the motion for nonsuit was made and granted. In support of the motion and of the ruling of the trial court, it is argued that plaintiff, by her testimony, failed to show a sufficient description of any land owned by her in possession of the defendants, and that she made no attempt to describe or identify the lands in controversy or claimed to be in controversy.

Under the pleadings, as we understand them, it is admitted that the land in controversy is that portion of the north half of the Dice donation claim, if any, lying south of the line alleged by the defendant to be the agreed line dividing the claim, and bounded on the west by the Oregon & California Railroad Company's right of way, and on the east by the east line of the claim. The only uncertainty in the description contained in the complaint is the north boundary, and that is obviated by the an-

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swer. So that it was only necessary for the plaintiff, in order to make out a *prima facie* case, to prove that she was the owner of the north half of the claim, and that the south line thereof was south of the alleged agreed line, which is admitted to run two chains north of the dwelling-house, and this she did by her patent and the evidence of the county surveyor, who testified that the true division line as run by him was about thirty feet south of the house. From this testimony, if true, it is evident that the strip of land between the true division line, which is south of the house some thirty feet, and the alleged agreed line, which is north of the house two chains and which is admitted to be in the possession of the defendant, is on plaintiff's portion of the claim and that she is the owner and entitled to the possession thereof, unless the defense set up in the answer is sustained. Such being the case, we think there was evidence sufficient to go to the jury, and the motion for nonsuit ought to have been overruled. Judgment reversed.

REVERSED.

[Argued March 26; decided April 17, 1894; rehearing denied.]

CUSICK v. HAMMER.

[S. C. 36 Pac. 525.]

ESTATES OF DECEDENTS—APPOINTMENT OF CREDITOR AS ADMINISTRATOR.—

A petition by one who alleges himself to be the principal creditor of a decedent's estate, asking for the appointment of petitioner as administrator of the estate and for the removal of another creditor who has been appointed administrator, is insufficient unless it avers the facts which make him the principal creditor,—a general allegation to that effect is not sufficient.

APPEAL from Marion: GEO. H. BURNETT, Judge.

This proceeding was commenced in the county court of Marion County to set aside and revoke the appointment

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of Seth R. Hammer as administrator of the estate of Henry E. Sterling, deceased, and for the appointment of R. J. Fleming in his place. The facts are that on February twenty-first, eighteen hundred and ninety-three, and within thirty days after the death of Sterling, Hammer was, on the petition of the only heir of deceased, appointed administrator of his estate, and immediately qualified and entered upon the discharge of his duties. After the expiration of thirty days, and within forty days from the death of the intestate, Fleming and other creditors filed a petition for the removal of Hammer and the appointment of Fleming, in which it was alleged, among other things, that Fleming is the principal creditor of the estate, and that Hammer is not a creditor thereof. In response to a citation, Hammer appeared and moved to dismiss the petition. The motion was accompanied by, and in part based upon, an affidavit of Hammer, in which he states that the estate is indebted to him for cash loaned to the deceased on or about December twentieth, eighteen hundred and ninety-one, and that the petition for his removal is false in alleging that he is not a creditor. Upon this showing, the county court denied the prayer of the petition, and, on appeal to the circuit court, its action was affirmed, hence this appeal.

AFFIRMED.

Mr. S. T. Richardson, for Appellant.

Messrs. Bonham & Holmes, for Respondents.

Opinion by MR. JUSTICE BEAN.

Under the statute (Hill's Code, §§ 1085, 1086,) the right to administer upon an estate is first in the widow or next of kin, or both, in the discretion of the court, if qualified and competent for the trust; but if they do not apply within thirty days from the decease of the

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intestate, they shall be deemed to have renounced their right thereto, and it is then in one or more of the principal creditors, if they apply within forty days. It is under this latter provision that the petitioners claim the right to administer upon the estate, and to have the letters issued to Hammer revoked and recalled, but they are met at the threshold of the case by an objection which to us seems fatal. The petitioners claim that Fleming is the principal creditor of the estate, and therefore entitled to letters of administration, but this fact is left to stand alone upon a naked assertion to that effect. The record shows that both Hammer and Fleming are creditors, and, since Hammer's appointment is regular in form, before he can be removed, or his letters revoked, at the instance of some other creditor, who claims a better right to administer simply because he is the principal creditor, the petition for removal should aver the facts which make him such creditor, and a general allegation to that effect is not sufficient: *White v. Spaulding*, 50 Mich. 22, 14 N. W. 684. In an *ex parte* application for the appointment of an administrator, an allegation that the petitioner is the principal creditor of the estate would perhaps be sufficient to give the court jurisdiction to make the appointment, but when the regularity of an appointment already made is attacked, and sought to be revoked because issued to the wrong member of a class entitled to administer, the petitioner must affirmatively show in an issuable form facts which, if true, give him the preference under the law. It follows, therefore, that the decree of the court below must be affirmed.

AFFIRMED.

Statement of the case.

[Argued March 29; decided April 24, 1894.]

COOK v. CROISAN.

[S. C. 36 Pac. 582.]

35	475
37	48
25	475
33	406

AMENDMENT TO CONFORM PLEADINGS TO FACTS PROVED.—Where evidence is received without objection as to material matters not set up in the pleadings, a refusal of leave to amend so as to conform the pleadings to the real issue tried is reversible error.

APPEAL from Marion: GEO. H. BURNETT, Judge.

This action was brought by Jesse T. Cook and others against E. M. Croisan to recover the value of certain personal property which the defendant, as sheriff, seized and sold under an execution. The defendant denied that plaintiffs, or either of them, owned such property, or any part thereof, the value of each item as alleged, etc., but alleged that he took the same, and sold it at public auction, under an execution as provided by law, and that it brought the sum specified, and no more. It appears from the bill of exceptions that the plaintiffs, to sustain the issues on their part, introduced evidence tending to show that they were the owners of two thirds of the property in controversy, and that the defendant sold not only the interest of Joseph F. Cook, but that of plaintiffs also; while the defendant, to sustain the issues on his side, introduced evidence tending to show that he only levied upon and sold the interest of the execution debtor, Joseph F. Cook, in the property in question. It also appears that during the progress of the trial, while one of the attorneys for the defendant was engaged in addressing the jury, the court, after an inspection of the pleadings, discovered that the question which they were litigating, namely, whether or not the defendant sold the whole of such property, was not raised by the answer, whereupon the defendant, by

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his counsel, requested leave to amend his answer so that it would conform to the facts proved. A motion to that effect having been filed, the court overruled the same, and, after argument of counsel had been concluded, instructed the jury that it was not disputed by the pleadings that the defendant had sold the whole of such property at the execution sale. Upon this state of the case, the jury returned a verdict in favor of the plaintiffs, and from the judgment which was subsequently rendered thereon, this appeal is brought.

REVERSED.

Messrs. Tilmon Ford and William M. Kaiser, for Appellant.

Messrs. Bonham & Holmes, for Respondents.

Opinion by MR. CHIEF JUSTICE LORD.

We think the amendment ought to have been allowed, as it was clearly one the court was authorized to make. When the parties proceed with a trial, and evidence is received without objection, supporting material matters which are not set out in the pleadings, the court may permit the pleadings to be amended to conform with the proofs. In *Flanders v. Cottrell*, 36 Wis. 564, it was alleged in the complaint that Noonan sold the press to Amberg & Co. for the defendants, and at their request, and no other or different cause of action was stated. This allegation was entirely unproved, but the question litigated was not whether Noonan sold the press, but whether he was instrumental in enabling the defendants to sell it. The court say: "This question was sharply litigated; much testimony in respect to it was given by both parties; and it was submitted to the jury as the controlling question of fact in the case. All this was done without

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objection by either party. * * * Under these circumstances, it is too well settled to admit of doubt or controversy that the pleadings may at any time be amended to conform with the issue really tried, or the variance may be wholly disregarded." The practice of allowing amendments liberally, so as to enable the parties, while in court, to have their differences settled and determined, has been uniformly approved and encouraged by the courts. This is especially so when leave to amend is asked for by a defendant. In the case at bar, the amendment, if allowed by the court, would have conformed the pleadings to the real issues between the parties, and upon which they had submitted their evidence without objection for the consideration and decision of the jury. The proposed amendments would not change the controversy between the parties, and could not take either by surprise. It seems to us, therefore, when the evidence had been submitted upon such an issue without objection, that substantial justice to both parties required that the amendment should be allowed, and the jury permitted to consider such evidence, and to determine the real merits of the controversy. It is true that the granting or refusing an application to amend is addressed to the discretion of the trial court, and is generally reviewable only for the purpose of determining whether there has been an abuse of such discretion. But, as STRAHAN, J., said, "when a party comes into court in good faith, with his action or suit, he should not be turned out on account of a technicality or mistake which an amendment would obviate, when it will do no substantial injury to the opposite party." The power of the court to allow amendments is not entirely discretionary; it is granted to advance justice, and should be exercised liberally in proper cases. The parties in this case were before the court, and introduced their evidence upon the

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real point in controversy between them, without objection. Under such circumstances, when the trial court refused to allow the defendant to amend his answer so as to conform to the facts proved and litigated, thereby excluding such evidence from the consideration of the jury, its action injuriously affected the substantial rights of the defendant, and constituted reversible error. As a consequence, the judgment must be reversed and a new trial ordered.

REVERSED.

[Argued April 12; decided April 30, 1894.]

MOFFITT v. McGRATH.

[S. C. 35 Pac. 578.]

1. SERVICE OF NOTICE OF APPEAL.—A written acknowledgment of the service of a notice of appeal by one of the parties is insufficient to authorize the court to assume jurisdiction without proof of the authenticity of the signature.
2. JURISDICTION—PRESUMPTION.—In case of an appeal on a jurisdictional question, the court will not presume that there was any proof beyond what appears in the record.

APPEAL from Sherman: W. L. BRADSHAW, Judge.

Action by N. E. Moffitt against Mrs. Mary McGrath and J. B. McGrath. Judgment for plaintiff, and Mary McGrath appeals.

REVERSED.

Messrs. Dufur & Menafee, for Appellant.

Messrs. J. B. Hosford and Mays, Huntington & Wilson, for Respondent.

Opinion by MR. JUSTICE BEAN.

This action was originally commenced in the justice's court for Moro Precinct, Sherman County, by the plain-

Opinion of the court—BEAN, J.

tiff against the defendant to recover the possession of a two-year-old filly, and for damages. Judgment being rendered in favor of the defendant, plaintiff appealed, or attempted to appeal, to the circuit court. A motion to dismiss the appeal for want of notice thereof being overruled, a trial was had, resulting in a judgment for plaintiff, from which defendant appeals, alleging as error the overruling of her said motion to dismiss the appeal. It is insisted that this motion should have been sustained upon the ground that the record does not disclose any proof of service of the notice of appeal upon the defendant. The only evidence of such service contained in the record is the following acknowledgment indorsed upon the notice of appeal: "Due and legal service of the foregoing notice of appeal is hereby admitted by me at Moro, Oregon, this twentieth day of October, eighteen hundred and ninety-three," purporting to be signed by Mrs. Mary McGath, attorney for defendant Mrs. Mary McGrath. This acknowledgment, it is objected, is insufficient as proof of the service upon the defendant, because, if it purports to be an admission of service by her attorney, it nowhere appears in the record that Mrs. Mary McGath was such attorney; or, if it purports to be an admission of service by the defendant herself, it is unaccompanied with proof of the genuineness of her signature. The similarity between the name Mrs. Mary McGath and that of the defendant renders it probable that the indorsement on the notice of appeal purports to be an admission of service by the defendant signed to a blank indorsement prepared in contemplation of an admission by her attorney, and we shall so consider it.

By section 527 of the Code, proof of the service of a notice of appeal shall be the same as the proof of service of a summons, and therefore it may be by the written admission of the party to be served, (section 61); but an

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indorsement upon a process of the written acknowledgment of service purporting to be signed by a party is not sufficient evidence of such admission unless it is accompanied with proof of the genuineness of the signature of the party, for the court cannot take judicial knowledge of the signature of a party who has not appeared in the cause, and therefore, without such proof, cannot know whether the signature is that of the party it purports to be or not. "It is well settled," says Mr. Justice FIELD, "that courts will take judicial notice of the signatures of their officers, as such; but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the court can not notice them": *Alderson v. Bell*, 9 Cal. 321. To the same effect are *Johnson v. Delbridge*, 35 Mich. 436; *Litchfield v. Burwell*, 5 Howard Pr. Rep. 346; *Bozeman v. Brower*, 6 How. (Miss.), 43; *Gatewood v. Rucker*, 1 T. B. Mon. 21; *Ex parte Gibson*, 10 Ark. 572; *Norwood & Chambers v. Riddle*, 9 Porter (Ala.), 425. It follows that the writing purporting to be an admission of service by the defendant, without proof of its authenticity, did not authorize the court to assume jurisdiction.

But it is contended that inasmuch as the court overruled the motion to dismiss, we must assume that satisfactory proof was made as to the genuineness of the signature to the pretended admission of service. This is a direct proceeding by appeal to review the action of the court below in overruling the motion to dismiss for want of service, and must be determined in this court upon the record, which shows that the only proof of service was the said pretended admission thereof, and there is

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nothing in the record to show that any proof was made as to the genuineness of her signature, or any finding of the court upon that question. The motion to dismiss was simply overruled, without any reasons being stated in the record therefor. Such being the case, and it affirmatively appearing that upon this record the action of the court below in overruling the motion was error, it follows that the judgment must be reversed and the cause remanded with directions to dismiss the appeal.

REVERSED.

[Decided April 30, 1894.]

25	481
47	160

FORSYTHE v. POGUE.

[S. C. 36 Pac. 571.]

LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER—CODE, § 2987.—

Under section 2987 of Hill's Code, providing that in a lease at will notice to quit is given in time if it equals the intervals between the payments of rent, a complaint in forcible detainer is good which alleges a tenancy at will, and twenty days' notice to quit, since it may be that the rent was payable at periods of less than twenty days.

APPEAL from Marion: GEO. H. BURNETT, Judge.

This is an action of forcible entry and detainer by Anna Forsythe against M. E. and Ada Pogue, brought before the recorder of the city of Salem, acting as *ex officio* justice of the peace, for the recovery of the possession of certain real property situated in said city. The record discloses that, upon issue being joined by the pleadings, a jury trial was had, which resulted in a verdict and judgment for the plaintiff, whereupon the defendants took the case on appeal to the circuit court, where, on motion for judgment on the pleadings, the court adjudged that the action be dismissed, and that the defend-

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ants recover their costs and disbursements. From such judgment the plaintiff has appealed to this court.

REVERSED.

Messrs. D'Arcy & Bingham, for Appellant.

Mr. William M. Kaiser, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

The complaint alleges that on or about the twenty-ninth day of May, eighteen hundred and ninety-one, plaintiff rented to the defendants by a verbal lease from month to month, to be terminated at the will of either party, certain premises therein described; that by virtue of such renting the defendants went into possession and occupation of the said premises, and still continue to hold and occupy the same; that although possession of said premises was duly demanded, the defendants unlawfully and wrongfully neglect and refuse to deliver to the plaintiff the possession of the same, and now unlawfully hold the same with force, and continue in possession thereof; that the plaintiff is entitled to the possession of the premises and demands restitution thereof. The contention for the defendants is that thirty days' notice was required to terminate the lease; that it is admitted only twenty days' notice was given; and, consequently, that the defendants, being in the lawful possession of the premises, were not liable to an action for unlawfully holding the same with force. The record shows that on the thirteenth day of December, eighteen hundred and ninety-two, the plaintiff served a notice in writing upon the defendants to deliver up the possession of the premises. The record also shows that the action was commenced on the second day of January, eighteen hundred and ninety-three, and that a trial was had, and a judgment rendered for the restitution of such premises on the

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seventh day of January, eighteen hundred and ninety-three. By considering these facts together, it appears that after the service of said notice, about twenty days elapsed before the action was commenced, or, in other words, only twenty days' notice was given to terminate the lease; hence the defendants' contention that, the complaint showing a tenancy at will from month to month, thirty days' notice was required by law to terminate it. Our statute (section 2987) provides that, "All estates at will or by sufferance may be determined by either party, by three months' notice in writing given to the other party; and when the rent reserved in a lease at will is payable at periods of less than three months, the time of such notice shall be sufficient if it be equal to the interval between the times of payment; and in all cases of neglect or refusal to pay the rent due on a lease at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease." The requirement of thirty days' notice to terminate the lease is contended for upon the assumption that the tenancy is at will, and the rent reserved is payable monthly. But there is nothing to show, by the allegations or by the record, how or when the rent was to be paid,—whether monthly, half-monthly, weekly, or otherwise,—or that the notice was not equal to the interval between the times of payment. THAYER, C. J., said: "Where the letting is for a less time than one year, the period for the notice is fixed by the manner of paying rent. If the rent is paid monthly, a month's notice is required": *Rosenblat v. Perkins*, 18 Or. 162, 22 Pac. 598, 6 L. R. A. 257. This case was cited and relied upon in support of defendants' contention, but the facts therein show that the rent was payable monthly, as also in the case of *Hislop v. Moldenhauer*, 23 Or. 119, 31 Pac. 252, but here the manner of paying the rent is not disclosed

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by the pleadings, so as to fix the time of the notice. Taking it for granted that the tenancy is at will, and governed by section 2987, the trial court could not say, on the complaint, that the thirty days' notice was required to terminate the estate, unless the facts alleged further disclosed that the rent was payable monthly or at intervals of thirty days. This being so, it results that the dismissal of the action was error, for which the judgment must be reversed and a new trial ordered.

REVERSED.

[Argued March 15; decided April 17, 1894.]

CHERRY v. MATTHEWS.

[S. C. 36 Pac. 529.]

ROAD SUPERVISORS—TAKING MATERIAL—INJUNCTION—CODE, § 4092.—A road supervisor, acting in good faith, cannot be enjoined from taking soil and gravel from neighboring lands for the repair of his roads, as Hill's Code, § 4092, confides the matter to his judgment, and the owner's rights are protected by his opportunity to claim damages in the county court. *Kendall v. Post*, 8 Or. 144, approved and followed.

APPEAL from Lane: J. C. FULLERTON, Judge.

This is a suit by David Cherry to enjoin the defendant, Alex. Matthews, as road supervisor, from taking gravel from the lands of plaintiff for the repair of the roads adjoining or near such lands. The plaintiff alleges that he is the owner of certain lands described in the complaint, and that the defendant is the road supervisor of the road district in which they are situated, and as such was engaged in repairing a county road in the vicinity of said lands; that he threatens to tear down the fences, and enter upon plaintiff's lands, and dig and carry away large quantities of soil and gravel for the purpose of repairing such roads; and that by so doing large holes will be left on

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said lands rendering them worthless, to the irreparable injury of the plaintiff, etc. A demurrer was interposed to the complaint on the ground that the facts stated were insufficient to constitute a cause of suit. The demurrer was overruled, and the defendant refusing to further plead, a decree was rendered for the plaintiff, from which this appeal was brought.

REVERSED.

Mr. Seymour W. Condon, for Appellants.

Mr. Joshua J. Walton, for Respondent.

The question resolves itself into this proposition: Can the court enjoin a road supervisor from doing irreparable injury to the premises of another,—in this case to the plaintiff? It seems to me this must be answered in the affirmative. Otherwise a citizen would be without remedy, and entirely at the mercy of a petty officer. What is there about the office of a road supervisor that should exalt him above the law and clothe him in such unlimited and tyrannical powers? Shakespeare has said: "Man clothed with little brief authority, cuts such fantastic tricks before high Heaven as would make angels weep." Much more a road supervisor, for he makes sinful mortals weep. Has he the right to destroy my estate because he is a road supervisor? Certainly not. If that proposition is once admitted by the court, then any citizen's property can be ruined and his home absolutely destroyed by a road supervisor under the guise and pretext of repairing a county road. The law does not contemplate such a thing, and the idea is certainly repugnant to our constitutional liberty.

Opinion by MR. CHIEF JUSTICE LORD.

The contention for the defendant is that the court below erred in overruling his demurrer for the reason that

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the facts alleged disclose that he was acting as road supervisor and his threatened acts would only be the exercise of a right expressly conferred by statute. By section 4092, Hill's Code, the duty is imposed upon the supervisor of roads to keep in repair all public roads in his district, and to enable him to do so he is authorized "to enter upon any lands adjoining or near the public road and gather, dig, and carry away any stone, gravel, or sand * * * necessary for the making and repairing any public road." This provision entrusts the jurisdiction of such matter to the judgment of the supervisor; he is to decide the mode of doing such work, when a county road needs repairing, and the kind of material to be used for that purpose. As this class of cases falls within the exception contained in section 18, article I., of the constitution, the prepayment of damages for the taking is not required. "It is not necessary," KELLY, C. J., said, "for the supervisor to wait until he can procure the consent of the owner or the judgment of a court assessing the damages to be paid for appropriating the materials necessary for the public use. Every owner of land holds it subject to be taken for the public use whenever it is necessarily required for such purpose, and to be appropriated in such a manner as the constitution and law provide": *Kendall v. Post*, 8 Or. 144.

The facts show that the alleged threatened acts are just such as the law sanctions when a supervisor is engaged in repairing county roads. In such case he may enter upon lands in the vicinity, and dig and carry away gravel, whether damages result or not. If he cause damage which entitles the party injured to compensation, such party may apply to the county court to assess and determine the amount thereof pursuant to section 4092. A supervisor acting in good faith and within the scope of his authority ought not to be controlled by injunction.

Statement of the case.

The highways must be kept in repair to accommodate the traveling public, and this duty the statute imposes upon the supervisor. There is no allegation that the defendant as supervisor was acting or threatening to act with partiality or malice, or that he intends in the discharge of his official duties to oppress or wantonly annoy the plaintiff, and in such case KELLY, C. J., said "the court ought not to interfere and restrain him from discharging those duties which the law has imposed upon him": *Kendall v. Post*, 8 Or. 144. It seems to us that plaintiff has shown no equity entitling him to relief. It results that the decree must be reversed, and the bill dismissed.

REVERSED.

[Argued March 15; decided April 17, 1894.]

CHERRY v. LANE COUNTY.

[S. C. 36 Pac. 531.]

25	487
40	216

1. CONSTITUTIONAL LAW—HIGHWAYS—TAKING MATERIAL FROM LAND.—Hill's Code, §§ 4092, 4093, authorizing road supervisors to take material for a road from land in their district, and providing for the assessment of damages thereafter by the county court, is constitutional, as the State Constitution, article I., § 18, provides that prepayment need not be made for property taken by the state for public use. *Branson v. Gee*, 25 Or. 462, approved and followed.
2. DAMAGES FOR PROPERTY TAKEN TO REPAIR ROADS—COUNTY COURT.—Where a road supervisor enters upon land under the statute, and takes material for a road, an action for damages will not lie against the county for trespass, the sole remedy being by application to the county court to assess the damages, and the action of such court is final. *Kendall v. Post*, 8 Or. 144, approved and followed.

APPEAL from Lane: J. C. FULLERTON, Judge.

This is an action by David Cherry to recover damages for injuries to his lands, alleged to have been caused by taking gravel and stone therefrom by the road super-

Opinion of the court — LORD, C. J.

visor of the district for the repair of the county roads adjoining such lands. To the complaint the defendant interposed a demurrer, challenging the sufficiency of the facts to constitute a cause of action, which was sustained by the court; whereupon the plaintiff refusing to further plead, judgment was given in favor of the defendant for its costs and disbursements, to reverse which the plaintiff has brought this appeal. REVERSED.

Mr. Joshua J. Walton, for Appellant.

Mr. Seymour W. Condon, for Respondent.

Opinion by MR. CHIEF JUSTICE LORD.

1. The complaint shows that A. C. Stevens was the duly appointed and qualified supervisor of the road district, etc., and that the damage to the plaintiff's lands was caused by digging and carrying away gravel and rock therefrom for the purpose of repairing a county road adjoining such lands, and that the plaintiff made a claim in writing to the county court for his damages at the regular term thereof in November, eighteen hundred and ninety-two, but that such court refused to allow him the amount of damages claimed, or any greater sum than thirty-three dollars, which the plaintiff refused to accept. The statute authorizes the supervisor to commit just such acts as constitute the plaintiff's alleged grievance. It provides that "he shall have authority * * * to enter upon any lands adjoining or near the public road and gather, dig, and carry away any stone, gravel, or sand * * * necessary for the making and repairing any public road in his district." By force of this provision the duty is devolved upon the supervisor of determining in what manner a public road is to be repaired, and the kind of material to be used for that purpose;

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hence, when a public road needs repairing, the condition exists which authorizes the supervisor to take and carry away gravel and stone from the lands adjoining such road, whether any person be damaged or not. But if his acts cause damage to such lands, the injured party is entitled to redress and can obtain it by applying to the county court to assess and determine his damages pursuant to section 4093, Hill's Code. These provisions of the statute were held constitutional in *Branson v. Gee*, ante, p. 462, 36 Pac. 527, in that they afforded the party aggrieved an opportunity to be heard, and provided for the assessment of the damages he sustained. The fact that the statute does not require prepayment affords no objection, because cases of this character fall within the exception contained in section 18, article I, of the constitution, which section ordains that "private property shall not be taken for public use * * * without just compensation; nor, except in case of the state, without such compensation first assessed and tendered." The right to take materials for highways from the lands of private individuals is of no recent origin. It was a common-law right. Lands for highways, as well as timber, stone, and gravel with which to make, improve, or repair them, are taken by right of eminent domain: Cooley, Constitutional Limitations, 657. Referring to the right of the supervisor, under section 4092 of Hill's Code, to take gravel or timber from lands adjoining the highway, KELLY, C. J., said: "Every owner of land holds it subject to be taken for the public use whenever it is necessarily required for that purpose, and to appropriate it in such a manner as the constitution and law provide": *Kendall v. Post*, 8 Or. 144. Such being the case, the entry of the supervisor upon the lands for the purpose indicated cannot be treated as a trespass for which the county is in any way liable.

 Points decided.

2. But it is urged that the damages awarded is not the just compensation to which the plaintiff is entitled for the injury to his lands. The facts alleged show that the plaintiff submitted his claim to the county court, which assessed his damages at the sum already specified, but which the plaintiff declined to accept for the reasons stated. The county court is the only tribunal which has authority to assess and determine the damages to which the plaintiff was entitled by reason of the acts of the supervisor: *Kendall v. Post*, 8 Or. 144. On the question of damages, the state has not given the right of appeal; and as the court, when engaged in the transaction of such business, exercises judicial functions or discretion, unless it exercises such functions erroneously, its decisions are not subject to review, and its award of damages in such cases must be regarded as just compensation. It doubtless would be better if the party aggrieved was given a right of appeal from the award, but that is a matter for the legislature. From these considerations it results that the judgment must be affirmed.

AFFIRMED.

[Argued March 14; decided April 24, 1894.]

WHITEAKER v. BELT.

[N. C. 36 Pac. 534.]

25	490
41	376
25	490
43	508
25	490
148	308

1. **EFFECT OF ADMINISTRATOR'S SALE ON WIDOW'S DOWER—CODE, § 1153.**—A widow's right of dower is unaffected by an administrator's sale of realty for the payment of debts of the deceased, under section 1153, Hill's Code, which authorizes the administrator to sell only "the estate, right, and interest of the testator in the premises at the time of his death," whether the debts be a lien on the land, or only simple contract debts.
2. **ESTOPPEL.**—Where the widow has done nothing to lead a purchaser at an administrator's sale to believe that he would acquire a title free from her dower, she is not estopped to claim dower by the fact that the pro-

Statement of the case.

ceeds were used to pay a mortgage debt under which her dower was about to be sold.

APPEAL from Polk: GEO. H. BURNETT, Judge.

This is a proceeding in the nature of a crossbill by Geo. W. Whiteaker against Jennie Belt to enjoin an action at law commenced by Mrs. Belt against Whiteaker to recover a dower interest in certain real property in Polk County. The facts are that on May eighteenth, eighteen hundred and eighty-five, T. W. Belt, the husband of the defendant, died seized of the property in question, which was at the time subject to a mortgage in favor of John Klosterman, executed by the defendant and her husband to secure the payment of a promissory note of the husband, upon which there was due at the time of his death about eight hundred dollars. After the appointment of an administrator of the estate, Klosterman commenced a suit in the United States circuit court for the district of Oregon to foreclose the mortgage, making the administrator and the defendant parties. In this suit, by stipulation, it was agreed that further proceedings should be suspended until the premises could be sold by order of the county court in the manner provided by law for the sale of the property of an estate for the payment of debts, and, if the proceeds of such sale were applied to the payment of Klosterman's mortgage, the suit should be dismissed. Thereupon the administrator filed his petition for an order of sale in the county court of Polk County, in which he set forth that the property was incumbered by the Klosterman mortgage, and that it would be necessary to sell the same in order to satisfy the mortgage. On the hearing of the petition the court ordered and directed the sale to be made, which was accordingly done, and the land purchased by the plaintiff for the sum of one thousand two hundred and fifty dollars; the ad-

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ministrator representing to him at the time, but without the knowledge or authority of the defendant, that such sale would convey a title free from dower. The Klosterman note was subsequently paid, the mortgage satisfied out of the proceeds of the sale, and the foreclosure suit dismissed. The sale being confirmed, the administrator executed and delivered to plaintiff a conveyance of the property. At the circuit court plaintiff's complaint was dismissed, and judgment entered against him for costs, from which he appeals.

AFFIRMED.

Messrs. A. M. Hurley and Bonham & Holmes, for Appellant.

To begin with, we maintain that under our statutes no dower right attaches in the real estate which has been sold to satisfy a mortgage, in which the wife has joined, and this is true regardless of the manner in which the sale was made. The learned circuit judge while recognizing the force of the statutes seemed to be of the opinion that the sale under consideration means only a sale under foreclosure proceedings. In this we insist that he was in error; the true test being, was the land sold to satisfy the mortgage? We refer to sections 2958 and 2959. These sections were amended in eighteen hundred and ninety-three. See Session Laws, 195. But the amendment has in no wise affected the rights of the parties in the case now under consideration. When a wife signs away her inchoate right of dower, which she may do by mortgage deed as well as by deed of bargain and sale, she has no right in law or in equity to claim the benefit of dower when the identical property is sold to discharge that obligation. The testimony in this case now in record, shows Mrs. Belt was particularly active in stopping the foreclosure proceedings in the United States court. She went to Portland and inter-

Argument of counsel.

viewed Mr. Klosterman and got him to consent to sell the land, to pay this mortgage, through the instrumentality of the county court. She was constantly advising with her brother-in-law, the administrator, regarding the matter of the sale of the land to pay her mortgage, and thoroughly understood, sanctioned, and acquiesced in what he did. While there was no application to redeem the land from the mortgage, we think there was a substantial compliance with sections 1162 and 1163 of the statutes, which provide the manner of sale of mortgage property by administrators and which also declare the legal effect thereof.

On the point that the sale of the land extinguished the dower interest of the respondent, we cite in the support of the statute above referred to: *Blair v. Blair*, 45 Iowa, 42; *Melone v. Armstrong*, 79 Ky. 248; *Schwitzer v. Wagner*, 22 S. W. 883; *Gowan v. Hatcher*, 39 Iowa, 695; *Mock v. Watson*, 41 Iowa, 241; *Stewart on Husband and Wife*, § 279.

On the question of the equitable rights of the parties and the estoppel of Mrs. Belt, which is relied upon in our case, we cite: *Dashler v. Berry*, 4 Dallas (Penn.), 300; *Newton v. Cook*, 4 Gray, 46; *Bell v. Major*, 10 Paige Ch. 50; *Popkin v. Bunstead*, 8 Mass. 491, 5 Am. Dec. 113; *McCabe v. Bellows*, 7 Gray, 148, 66 Am. Dec. 467; *Hawley v. Bradford*, 9 Paige Ch. 200, 37 Am. Dec. 390; *Hitchcock v. Harrington*, 6 Johnson, 290, 5 Am. Dec. 229; *Helm v. Love*, 41 Ind. 210.

And on the question that the respondent has no right to maintain ejectment for her alleged dower without redeeming or offering to redeem the land from the effect of the mortgage, we cite: *Jones on Mortgages*, § 674; *Cook v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709; *House v. Fowl*, 22 Or. 303; *Stewart on Husband and Wife*, § 276.

Messrs. Daly, Sibley & Eakin, for Respondent.

Opinion of the court—BEAN, J.

Opinion by MR. JUSTICE BEAN.

1. Upon these facts the question arises whether, by the order of the county court directing the sale of the property for the payment of the debts of the estate, and the subsequent proceedings had in that court, and the acts of the defendant, she is estopped or concluded from claiming dower in the premises as against the purchaser at such sale. It was held in *House v. Fowle*, 22 Or. 303, 29 Pac. 890, that under the statute of this state a widow's right of dower is unaffected by an administrator's sale by order of the county court for the payment of the debts of the deceased. Such sales are judicial in their character, and, like sales under an execution, the widow's right to dower is unaffected. The administrator is only authorized to sell and convey "the estate, right, and interest of the testator in the premises at the time of his death": Hill's Code, § 1153. And the rule is the same whether the sale is made to pay or discharge a lien upon the premises, or to pay simple contract debts of the estate, unless perhaps it be made on an application for an order of redemption as provided in sections 1161, 1162 1163, a question which is unnecessary for us to consider at this time. The rule of *caveat emptor* applies to an ordinary administrator's sale, and the purchaser is supposed to have examined the record, and know what he is buying, and to purchase with knowledge that the dower is yet an incumbrance on the land, and if he does not do so, it is his own fault, for which he can blame no one but himself. It is clear, therefore, that the defendant is entitled to recover her dower in the premises, unless, by her acts or conduct, she has waived the same, or induced the plaintiff to purchase the premises for the full value thereof, under the belief that he would acquire a title to the same discharged from her right of dower.

2. The authorities are generally agreed that when a dowress, by her representations or conduct, induces one to purchase an estate under a belief that she waives her dower, or that it is free from the claim of dower, she will be estopped from afterwards setting up her claim, (2 Scribner on Dower, § 266; *Ellis v. Diddy*, 1 Ind. 561; *Lawrence v. Brown*, 5 N. Y. 394,) but, to constitute such an estoppel, it must appear that by her words or conduct she caused the purchaser to believe that by such purchase he would acquire a title discharged from her estate in dower, and he must have acted upon such belief. Where she has done nothing to deceive or mislead the purchaser, her mere silence does not affect her right. Now, in this case, there is nothing whatever in the evidence showing, or tending to show, that the defendant at any time represented to the plaintiff, or any one else, that a title free from her dower would be given to the purchaser at the administrator's sale, or that she authorized or empowered the administrator to make such representation, or that defendant acted upon any representation or conduct of the defendant in making the purchase. Indeed, the plaintiff himself testifies that he never had any conversation with the defendant about the purchase of the land, or of her interest therein, and, manifestly, she would not be bound by any representations of the administrator made without her knowledge or consent. The only circumstance relied upon as a ground for equitable relief, so far as we can ascertain from the record, is that the stipulation in the Klosterman foreclosure suit was made to enable the administrator to realize the money with which to pay the mortgage by sale of the land under an order of the county court; and from this it is argued that, because the sale of defendant's dower under the mortgage was prevented by such stipulation, it operated as a consent on her part to a sale of it under an

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order of the county court to pay off the mortgage. But the evidence shows that this stipulation was not made at her solicitation, or with her knowledge, but by the administrator, on his own motion, for the purpose of saving to the estate the expense of a foreclosure suit, and that she knew nothing about it until after it had been signed. The stipulation was not intended or designed to affect her dower in any way; and, besides, there is nothing in the evidence to show that plaintiff, prior to his purchase, had any knowledge of either the foreclosure suit or of the stipulation. When the plaintiff made the purchase of the land in question he undoubtedly believed that he was acquiring a title free from dower; but it is very clear such belief was not induced by any declaration or conduct of defendant, but was one for which she was in no way responsible. Such being the case, we see no room for the application of the doctrine of estoppel or of equitable subrogation, and it follows that the decree must be affirmed.

AFFIRMED.

[Argued January 23; decided March 12, 1894.]

JOHNSON v. JOHNSON.

[S. C. 35 Pac. Rep. 161.]

APPEAL from Benton: J. C. FULLERTON, Judge.

Defendant appeals.

AFFIRMED.

*Messrs. John Kelsay and J. J. Daly, for Appellant.**Mr. W. S. McFadden, for Respondent.*

PER CURIAM.

This is a suit brought by M. F. Johnson against J. L. Johnson for divorce. She charges him with desertion

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and cruel treatment, which he denies, and charges plaintiff with having committed adultery with divers persons. The plaintiff, after denying the new matter in the answer, alleges in her reply that the defendant associated with prostitutes, and committed adultery with certain persons. The cause was referred to take the testimony, and upon the report thereof the court found that the equities were with the plaintiff, decreed a dissolution of the marriage contract, awarded plaintiff the undivided one third of defendant's real property, and her costs and disbursements, from which he appeals. The evidence, in our judgment, shows that the allegations of the complaint and reply have been fully established, and, unless the plaintiff's conduct has been such as to bar her right to equitable relief, the decree should be affirmed.

The record shows that the parties were married December twenty-fifth, eighteen hundred and seventy-two, and appeared to live happily until about January, eighteen hundred and eighty-one, when the plaintiff desired to visit her mother, then living in Northern California, whom she had not seen for about seven years. The defendant objected to this proposed visit, which led to some difficulty between them, and the plaintiff, in order to secure the means to make the journey, executed and delivered to the defendant a quit-claim deed purporting to convey to him, in consideration of three hundred dollars, her right, title, and interest in and to his real property. Upon the receipt of said sum she visited her mother, and remained with her until about June, when the defendant went after her and took her home. The defendant seeks to prove that the plaintiff's motive in making the journey was not to visit her mother, but to accompany one J. R. Beggs, a school teacher, who boarded with the parties to this suit. William Burns, a nephew of the defendant, then thirteen years of age, testified that

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Beggs was boarding at his uncle's, in the winter of eighteen hundred and eighty-one; he staid there while his uncle was away from home, attending court, and that he saw the plaintiff and Beggs exchanging written notes with each other. The defendant testified that Beggs left about the time plaintiff went away, and that he saw in the Oregonian a list of passengers by steamer from Portland to San Francisco in which the names of plaintiff and said Beggs appeared. The plaintiff, in explaining the written notes which the witness Burns saw, testified that Beggs had set a copy of capital letters for her, which she tried to imitate; that she never saw Beggs after she left home in January, and that if he was a passenger on the steamer with her she never knew it. A copy of the passenger list of the steamer State of California, as published in the daily Oregonian, February eleventh, eighteen hundred and eighty-one, certified to by H. L. Pittock, manager of said paper, was offered in evidence, in which plaintiff's name appeared as one of the passengers, but it did not contain the name of said Beggs. This paper was not properly authenticated, and, as offered, was not admissible.

The record further shows that the plaintiff lived with the defendant from the time she returned, in June, eighteen hundred and eighty-one, until the fall of eighteen hundred and eighty-two, at which time, as she testified, he pulled her out of bed, beat and choked her, and brandished a revolver about her head, when she again left home in consequence of such treatment, and remained away about two years, supporting herself by dressmaking at McMinnville and Portland. The defendant tried to show that in leaving home at this time she was prompted by a desire to be with one Charles Stafford, and the witness Burns testified in his behalf that Stafford was employed as a laborer by his father, who

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lived about one mile from the home of plaintiff; that she frequently visited their house while Stafford was there, and that they seemed to desire to get by themselves to talk whenever they could; that at one time the plaintiff started from his father's house towards her home, and Stafford, who was hauling wood from the direction she was going, followed her with his team in about one half hour; that about one half hour after Stafford left he went in the same direction after the cows, and found Stafford's team standing at the edge of the road but did not see either party. The plaintiff testified that she did not meet or see Stafford on that occasion. The evidence also shows that in eighteen hundred and eighty-two the plaintiff accompanied Stafford to a dance, and the next day went with him to the home of her brother-in-law, where they arrived about eleven o'clock in the forenoon. The defendant testified that he attended this dance, and, though he requested the plaintiff, she refused to dance with him, and went to supper with Stafford. The plaintiff testified that she was staying at the home of a friend where there were quite a number of young people going to the dance, who invited her to accompany them; that she promised to go if she could be taken to the home of her brother-in-law the next day; that Stafford promised to take her there, and for that reason she went to the dance; that she danced with the defendant two or three times that evening, and the next day rode to her brother-in-law's with Stafford, and that she never rode with him at any other time.

She also testified that in the fall of eighteen hundred and eighty-four, at the defendant's request, she returned to live with him; that the following spring they moved to Corvallis, where the defendant engaged in the livery business, and she kept a lodging-house, he paying the rent and furnishing the fuel; that in the spring of eigh-

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teen hundred and eighty-nine he refused to pay the rent, and in May she moved to Portland, where she kept a lodging-house until July, when at his request she returned. The defendant seeks to show that plaintiff's motive for leaving at this time was a desire to be with one Jehiel Stewart. E. A. Thayer testified that he was acquainted with and saw the plaintiff and said Stewart enter a small cottage on Ninth Street, in Portland, in a respectable neighborhood of that city. The plaintiff and Stewart both testified that they never met or saw each other in Portland. The plaintiff, when she was returning from Portland, in July, eighteen hundred and eighty-nine, was taken sick on the train, having been paralyzed in her hand and arm, and the defendant, upon receiving a telegram from the conductor, met her at the depot upon the arrival of the train, and took her to the hotel; that she remained at the hotel for some time, and then went to the home of G. W. Bigham and wife, who kept a restaurant in Corvallis. Mrs. Bigham testified that while the plaintiff was staying with her she requested the witness to permit said Stewart to come into the house at night, by the back gate from the alley, and to prepare a bed for him on a lounge in an adjoining room having a door between it and plaintiff's room; that she arranged the gate and lounge as requested, and presumed that Stewart came, because she saw him leaving the house at eleven o'clock the next morning. Bigham also testified that after the plaintiff had been at his place nearly seven weeks, she returned to the Mason House in said city; that he took meals to her from his restaurant, and that at plaintiff's request he placed a chair outside her window, that Stewart might enter her room; that she told him to see Stewart and send him to her; that he met Stewart the next morning, and told him what he had done, and Stewart said he had been there and seen

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her; that plaintiff requested him to keep the matter a secret; that for a period of about two weeks after she left his restaurant he carried notes to and from the plaintiff and Stewart.

It must be admitted that these witnesses were very accommodating persons. Mrs. Bigham, a married woman, was willing to open the back gate to admit Stewart, and arrange a lounge in her house for his accommodation, and her husband was equally willing to arrange a chair that he might enter the plaintiff's room, and then notify Stewart of what he had done. These witnesses testify that when plaintiff came to their home Stewart agreed to pay them for her board, and that because of this promise, and of the plaintiff's request, they were willing to extend these little courtesies. The evidence shows that the windows of the room plaintiff occupied at the Mason House at the time it is claimed Bigham arranged the chair for Stewart's visits were in plain view of the public, and, to say the least, it seems highly improbable that plaintiff would advertise his visits in this open manner. It appears also that the defendant roomed with the Bighams about three months just prior to the trial, and settled the plaintiff's old board bill, which they say Stewart refused to pay. These circumstances doubtless generated a friendly feeling in the Bighams for the defendant, and corresponding antipathy toward the plaintiff, and may account for their decided leaning to the defendant's side of the case. The record shows that G. W. Bigham, on November sixteenth, prior to the trial, made an affidavit, in which, after deposing that he arranged the chair as above stated, said: "And I did the same thing a few days afterwards at her request. The plaintiff told me, the second time that I put out the chair for her, that she was expecting Jehiel Stewart there to stay with her that night and that was the way he came in." In the cross-examination of this

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witness he testified that he arranged the chair but once, and when his attention was called to the fact that, in his affidavit, he had sworn that he arranged the chair more than once, explains the discrepancy by saying: "The first time that I placed the chair is just as you have it there. I had taken the meal over, is the way I came to do that. As regards to the chair being placed there afterwards I do not remember of stating anything of the kind; think it must have been a mistake of the copy." Here is an admission that the affidavit, deliberately made by him, was false, in stating that he arranged the chair at the window more than once. He had probably forgotten what he stated in the affidavit, and hence the conflict in his testimony. The maxim, *falsus in uno, falsus in omnibus*, may well be applied to the testimony of this witness.

The plaintiff testifies that in September, eighteen hundred and ninety, the defendant, being intoxicated, assaulted and beat her, knocking her down upon the floor; that he put his knee upon her, scratched her face, and blacked her eye. One of her witnesses testified that she saw the defendant go to the plaintiff's house, and in a short time the plaintiff came to her house crying, her face bleeding and her throat scratched. The physician who waited upon the plaintiff at this time corroborates her witness as to the scratches, blows, and bruises upon her head and face. This was the last punishment inflicted upon the plaintiff by the defendant, and from that time he slept in his stable. The record shows that at the time of the marriage the defendant had a team, and about three hundred dollars in money, and the property he now owns has been acquired since that time; that the plaintiff, except when driven off by his cruel treatment, has assisted him in the accumulation of what he now has, and in equity ought to have a share thereof, and, the court having awarded this to her, the decree is therefore affirmed.

AFFIRMED.

Statement of the case.

[Argued January 30; decided April 3, 1894.]

25 500
136 182

STATE v. LINN COUNTY.

[S. C. 36 Pac. 297.]

1. **TAXATION—BOARD OF EQUALIZATION—APPORTIONMENT OF TAXES, ACT OF 1891—CODE, § 2780.**—Under section nine of the act of eighteen hundred and ninety-one, (Laws 1891, p. 184,) it is the duty of the governor, secretary of state, and state treasurer, to apportion the state tax among the several counties upon the values as equalized by the state board of equalization, and not in the manner prescribed by section 2780, Hill's Code, this latter having been modified by the later law on the same subject.
2. **CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION—LAWS, 1891, p. 184—CONSTITUTION, ARTICLE IV. § 20.**—The fact that the act of eighteen hundred and ninety-one (Session Laws, 1891, p. 184,) creating the state board of equalization, etc., prescribes certain duties to be performed by the secretary of state and the several county clerks, after the assessment has been equalized by the state board, which are not embraced in its title, does not render so much of the act as undertakes to prescribe such duties obnoxious to Constitution, article IV. § 20, which requires an act to embrace but one subject, "which subject shall be expressed in the title," since these provisions naturally relate to and are connected with the subject matter of the act. *State v. Shaw*, 22 Or. 287, approved and followed.

APPEAL from Linn: GEO. H. BURNETT, Judge.

This is an action to recover a balance of three thousand seven hundred and thirty-three dollars and fifty-one cents alleged to be due from Linn County to the state of Oregon on account of state taxes for the year eighteen hundred and ninety-one. The controversy grows out of an increased valuation of real and personal property of the defendant in the sum of seven hundred and forty-six thousand seven hundred and thirteen dollars, made by the state board of equalization, over and above that of the county assessor, as corrected and approved by the county court of Linn County. Issue was joined by the pleadings, and at the trial plaintiff obtained judgment for the

Opinion of the court—MOORE, J.

amount claimed, besides its costs and disbursements, from which the defendant appeals.

AFFIRMED.

Mr. J. N. Duncan (Messrs. Blackburn & Watson on the brief), for Appellant.

Mr. Geo. E. Chamberlain, Attorney-General, for the State.

Opinion by MR. JUSTICE MOORE.

1. It is contended that the governor, secretary of state, and state treasurer had no authority to apportion the state tax among the several counties upon the equalization of the assessment made by the the state board of equalization, but that under the provisions of section 2789, Hill's Code, they should have made the estimate of the amount of the state tax from the abstracts of the several assessment rolls transmitted to the secretary of state by the county clerks of the several counties. Section 9 of the act creating the state board of equalization (Laws, 1891, p. 182,) provides that when such board has equalized the assessment of property among the several counties, the chairman and secretary thereof shall certify to the secretary of state the rate per cent to be added to or deducted from the assessed valuation of each class of property in the several counties, and also the amounts of the aggregate valuation as equalized by the board. Prior to the act of eighteen hundred and ninety-one, the assessment rolls were complete when certified up to the secretary of state by the several county clerks, but after the passage of that act they were not complete until equalized by the state board, and the result certified to the secretary of state by the chairman and secretary of said board. The act creating the state board of equalization is remedial in its character, and intended to prevent

fraud, suppress wrong, and promote the public good; and hence, to accomplish these objects, it should be construed most favorably: Endlich on Statutory Construction, §§ 107, 346. Statutes *in pari materia* must be construed together, and are treated, though separately enacted, as having formed in the minds of the legislative body parts of a connected whole: *Smith v. Kelly*, 24 Or. 464, 33 Pac. 645; Sutherland on Statutory Construction, § 288; Endlich on Statutory Construction, § 47. The object and purpose of the act of eighteen hundred and ninety-one was to correct any inequality of assessment and taxation in the several counties of the state: *Or. & Cal. R. R. Co. v. Croisan*, 22 Or. 393, 30 Pac. 219; *Smith v. Kelly*, 21 Or. 464, Pac. 645; and, though apparently disconnected with the prior assessment laws, must be construed in connection with them, and in the light of the evils sought to be corrected; and hence such act, being the latest expression of the legislative will, must be held to modify said section 2789, and to authorize the governor, secretary of state, and state treasurer to apportion the state tax among the several counties upon the equalization made by the state board.

2. It is further contended that inasmuch as the act of eighteen hundred and ninety-one prescribed certain duties to be performed by the secretary of state and the several county clerks, after the assessment has been equalized by the state board, which are not embraced in the title, that, therefore, so much thereof as undertakes to prescribe such duties is in violation of section 20 of article IV.* of the constitution. The decision in *State v. Shaw*, 22 Or. 287, 29 Pac. 1028, settles this question against the defendant. In that case it is held by BEAN,

* Constitution, article IV., section 20, provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."

 Points decided.

J., delivering the opinion of the court, that "if all the provisions of the law relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional as in violation of this clause of the constitution. This clause is not violated by any legislative act having various details properly pertinent and germane to one general object. The question is whether, taking from the title the subject, we can find anything in the bill which cannot be referred to that subject." Tested by this rule, we fail to see any clear and palpable conflict between the constitution and the act of eighteen hundred and ninety-one. For these reasons the judgment should be affirmed, and it is so ordered.

AFFIRMED.

[Decided May 3, 1894; rehearing denied.]

HARDING v. GRIM.

[S. C. 35 Pac. 684.]

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| 25 | 506 |
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| 46 | 419 |
1. PROMISSORY NOTE—STATUTE OF LIMITATIONS—EVIDENCE.—An indorsement of a credit on a promissory note, made after the statute has run against it, is no evidence that the payment representing such credit was made.
 2. ADMINISTRATION—ALLOWANCE OF CLAIM—EVIDENCE.—Under Hill's Code, § 1134, providing that no claim rejected by an administrator shall be allowed, except upon evidence other than that of the claimant, the production of a note, with payments indorsed thereon after such note was barred by the statute, and the testimony of a stranger that decedent once gave him money to deliver to plaintiff as payment "on that note," does not identify the note, or show part payment of an admitted larger debt, and is insufficient to establish such claim, for in order to give a payment made on a debt against which the statute has run the effect of reviving an obligation, it must clearly appear that it was made and received as part of a larger indebtedness, and under such circumstances as to warrant a jury in finding an implied promise to pay the balance.

APPEAL from Marion: GEO. H. BURNETT, Judge.

Statement of the case.

This is an action by E. J. Harding against the defendant, as administrator of the estate of J. W. Grim, deceased, upon a promissory note made, executed, and delivered by his intestate to plaintiff on February seventh, eighteen hundred and fifty-eight, for the sum of five hundred and thirty-six dollars, payable two years after date, for which a verified claim was duly presented to and rejected by the defendant, as such administrator on the eleventh day of October, eighteen hundred and ninety-two. The defense is the statute of limitations. To take the case out of the statute, the plaintiff offered himself as a witness, and produced and gave in evidence the note in question, upon which were the following indorsements in the handwriting of the plaintiff: "Received fifty-three dollars (\$53.60) and sixty cents, April fifteenth, eighteen hundred and eighty."—"Received April sixteenth, eighteen hundred and eighty-one, fifty-three dollars and sixty-three cents on within as one year's interest."—"Received on within eighty (\$80) dollars, April fifth, eighteen hundred and eighty-two."—"Received June sixteenth, eighteen hundred and eighty-three, fifty dollars."—"Received July twentieth, eighteen hundred and eighty-three, three hundred (\$300) dollars."—"Received thirty dollars June fifteenth, eighteen hundred and eighty-seven." He testified that the payments indorsed on the note were each made by the intestate, and were indorsed thereon by the witness at the time they bore date; that the payment of June fifteenth, eighteen hundred and eighty-seven, was made while plaintiff and intestate were going to a reunion of the Oregon Pioneers, and that the indorsement thereof was made in the presence of the intestate. The witness had no special recollection of the other payments, but testified that they were made by the maker of the note, and by the witness indorsed thereon at or about the time of such payments.

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The plaintiff then called one Joseph Osborn, who testified that some time in eighteen hundred and eighty, the intestate gave him fifty-three dollars and some cents, with directions to give it to the plaintiff to apply on "that note," which he did. There was a judgment for defendant, from which plaintiff appeals. **AFFIRMED.**

Messrs. Bonham & Holmes, for Appellant.

Messrs. Tilmon Ford and Wm. M. Kaiser (Mr. Edgar Grim on the brief), for Respondent.

Opinion by MR. JUSTICE BEAN.

1. At the trial the plaintiff was nonsuited, on motion of the defendant, because he had not proven a cause sufficient to be submitted to the jury, by evidence other than his own, as required by section 1134, Hill's Code. This section, among other things, provides, "that no claim which shall have been rejected by the executor or administrator * * * shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant." The effect of this statute is that, while the claimant is a competent witness in an action against an executor or administrator upon a claim or demand against the estate of the deceased, he cannot prevail in the action unless he proves his case by some competent or satisfactory evidence other than the testimony of himself. His testimony may be used, perhaps, to corroborate other evidence in the case, but it is not sufficient, in itself, to establish his claim. There must be evidence tending to support the action, independent of his testimony, sufficient to go to the jury, and upon which the jury or other trier of fact would be authorized to find in his favor. As a consequence, it was incumbent on the plaintiff in this case to

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furnish some competent evidence tending to support his claim, other than his own testimony, and unless he did so, the nonsuit was properly granted. Now the note in suit is barred by the statute of limitations, and therefore furnishes no evidence of a present liability against the estate, unless there has been a payment made thereon by the intestate within six years prior to the commencement of the action. The burden of proof to establish such payment is upon the plaintiff: Wood on Limitations, § 116; *Riggs v. Roberts*, 85 N. C. 151, 39 Am. Rep. 692; and, under the statute quoted, he is required to do this by some competent or satisfactory evidence other than his own testimony. It is admitted that payment on the note by the intestate, within the time stated, would be a sufficient answer to defendant's plea of the statute, because it would be inconsistent with any other supposition than an acknowledgment by him of a continued liability. But the question presented by the record is, whether the testimony of Osborn and the indorsements on the note made by plaintiff, which was all the testimony offered or admitted tending to show payment, other than the testimony of plaintiff, either separately or together furnish any evidence that should have been submitted to the jury, from which they might have found that such payment was made. It is clear the indorsements alone, the first of which was made twenty years after the note became due, and long after it was barred, were not proper evidence to go to the jury. Indorsements on a promissory note, made by the promisee before it is barred by the statute, are, in some jurisdictions, held evidence of corresponding payments to remove the bar, on the ground that they are in the nature of admissions against the interest of the party making them; but it is nowhere held that such indorsements, made after the statute has run, afford any evidence whatever that the

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payments were made, or are competent to go to the jury as evidence of corresponding payments to remove the bar of the statute: Wood on Limitations, § 115; *Davidson v. Delano*, 11 Allen, 523; *Shaffer v. Shaffer*, 41 Pa. St. 51; *Goddard v. Williamson's Administrator*, 72 Mo. 131; *Roseboon v. Billington*, 17 Johns. 182; *Mills v. Davis*, 113 N. Y. 245, 3 L. R. A. 394, 21 N. E. 68.

2. Something more is needed, then, than the note, and the indorsements thereon, to carry this case to the jury. Now the only evidence of payment, other than that of the plaintiff, is the testimony of Osborn, who says that in eighteen hundred and eighty the intestate gave him fifty-three dollars and some cents to be delivered to the plaintiff as payment "on that note." Construing this as evidence tending to show a payment made by the intestate on a note against him held by the plaintiff,—which is the most favorable construction for the plaintiff,—it still does not identify the note in suit or tend to show a part payment of a greater debt. It may have been intended by the intestate as payment on a different note, or to satisfy an entire demand against him. The law is settled that where a specific sum of money is due upon a promissory note, a payment of a part of the debt is a sufficient acknowledgment to authorize the presumption of a promise to pay the remainder; but to raise an implied promise from a part payment of a debt, which will prevent the debtor from availing himself of the bar of the statute, it must appear to have been made and intended as an unqualified part payment of the debt in suit. "It must be shown to be a payment of a portion of an admitted debt, and paid to, and accepted by, the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder. If the payment was intended by

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the debtor to be a payment of all that was due, the circumstance of the creditor's having received it, and treated it as a part payment only, will not bring it within the statute. Part payment of a debt is not, of itself, conclusive to take the case out of the statute. In order to have that effect it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought, and that the payment was made as a part of a larger indebtedness, and under such circumstances as warrant a jury in finding an implied promise to pay the balance": Wood on Limitations, § 97; *Shaffer v. Shaffer*, 41 Pa. St. 51; *Sears v. Hicklin*, 3 Cal. App. 331, 33 Pac. Rep. 137. The principle upon which a part payment by a debtor will remove the bar of the statute is that it amounts to an acknowledgment of the debt, from which the law implies a new promise founded upon the old consideration. "But such acknowledgment," says Mr. Greenleaf, "ought to contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; or, if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, it has been held that they ought not to go to a jury, as evidence of a new promise, to revive the cause of action": 2 Greenleaf, Evidence, § 440; *Shaffer v. Shaffer*, 41 Pa. St. 51; *Landis v. Roth*, 109 Pa. St. 621, 58 Am. Rep. 747. No inference can be drawn from Osborn's testimony that the payment referred to by him was made on account of the note in suit, or as part of a larger indebtedness; and hence, if it be held that proof of a payment made in eighteen hundred and eighty would render the subsequent indorsements on the note competent as evidence of

 Points decided.

corresponding payments, and remove the bar, because declarations against the interest of the plaintiff, there is no competent evidence in the case sufficient to submit to a jury tending to show that a payment was in fact made at that time. Having reached the conclusion that neither the testimony of Osborn nor the indorsements on the note afford any evidence to remove the bar of the statute, it necessarily follows that there was no competent or satisfactory evidence given or offered by plaintiff on the trial, tending to prove his claim, other than his own testimony; and therefore the nonsuit was properly granted, and the judgment of the court below is affirmed.

AFFIRMED.

[Decided April 3, 1894.]

AVERY v. JOB.

[S. C. 36 Pac. 293.]

1. **MUNICIPAL CORPORATIONS—LIABILITY ON BONDS—INJUNCTION.**—It is a general rule that when the legislature authorizes a municipality to contract a debt, and issue bonds therefor, it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference, and, although a special tax or fund may be provided, the bondholder's remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way. The bonds, when issued, become a debt of the municipality for which it is primarily liable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of the general fund. In such cases property owners who are taxed for general municipal purposes may enjoin the improper issuance of the bonds, as their burden of taxation will be affected.
2. **MUNICIPAL CORPORATIONS—INJUNCTION—FRAUD.**—Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion,

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37	468
25	512
43	475

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but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers.

APPEAL from Benton: J. C. FULLERTON, Judge.

This is a suit brought by certain residents and taxpayers of the city of Corvallis to restrain the mayor, police judge, and members of the common council of said city from purchasing the plant of the Corvallis Water Company, and issuing bonds for the purpose of raising money to pay therefor. The case, as exhibited by the complaint, is that on the thirteenth day of July, eighteen hundred and ninety-two, the common council duly passed an ordinance providing for a special election to be held on the twenty-ninth day of August, eighteen hundred and ninety-two, for the purpose of voting on the question of issuing bonds for the erection or purchase of waterworks, as provided by subdivision 2 of section 37, and section 182 of the city charter, and designating the places in said city for holding such election, appointing judges and clerks thereof, and also directing the police judge to give ten days' notice in some local newspaper of the places designated for holding the election, and the names of the judges and clerks appointed to conduct the same, and the purpose of said election. In pursuance of this ordinance the police judge gave the notice as required, and on the day appointed an election was held in the city, resulting in a majority of the votes cast thereat being in favor of the issuance of said bonds. On the twenty-sixth of December, eighteen hundred and ninety-two, the council passed ordinance number forty-five, accepting a proposition of the Corvallis Water Company, made December twelfth, eighteen hundred and ninety-two, offering to sell to the city of Corvallis its waterworks, fixtures, and appurtenances thereto belonging, for

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the sum of twenty-eight thousand dollars, and contracted with the said company to purchase and pay for the same, and directed the police judge to enter into a contract to that effect, stipulating therein that the twenty-eight thousand dollars should be paid out of the proceeds of the bonds so voted, as soon as the money could be realized thereon.

On the ninth of January, eighteen hundred and ninety-three, an ordinance was passed declaring the result of the special election, and providing for the issuance of the bonds of the city in the aggregate sum of fifty thousand dollars, for the purpose of erecting or purchasing waterworks, to be executed by the mayor and police judge, and to be dated April first, eighteen hundred and ninety-three, payable twenty years from the date thereof, and to bear interest at the rate of six per cent per annum, payable semi-annually in United States gold coin, both interest and principal payable at Corvallis; also directing the police judge to advertise for proposals to purchase said bonds, and to sell and deliver the same. In pursuance of this ordinance, notice was given that proposals would be received up to, and opened on, the tenth day of March, eighteen hundred and ninety-three, for the purchase of the bonds. On the thirteenth day of March the council proceeded to consider the bids which were made in response to said notice, and by ordinance accepted the proposal of Lamprecht Bros. & Co., and directed the police judge to enter into a contract in writing with them for the sale of such bonds; but before the purchase of the waterworks was consummated, or the bonds delivered, this suit was commenced. The complaint alleges that the plant of the Corvallis Water Company, proposed to be purchased by the city, is not worth more than ten thousand dollars, is inadequate, faulty in construction, and wholly insufficient in every

Argument of counsel.

respect to supply the said city and its inhabitants with good, pure, and wholesome water; that the price agreed to be paid therefor is eighteen thousand dollars in excess of its value, and that the proposed outlay, if consummated, will be an unreasonable and flagrant misappropriation of the city's resources; that the proceedings of the council in reference to the issuance of the bonds are void and of no effect, because neither the ordinance providing for the special election, nor the notice thereof, states or submits to the voters the question as to the amount of bonds to be issued, or the character or probable cost of the works the council contemplated erecting or purchasing. To this complaint a general demurrer was sustained, and defendants refusing to plead further, a decree was rendered in favor of plaintiffs, from which this appeal is taken.

AFFIRMED.

Mr. Reuben S. Strahan (Messrs. John W. Whalley, Martin L. Pipes, and J. R. Bryson on the brief), for Appellants.

The plaintiffs' right to maintain the suit is denied. They show no interest whatever in the controversy. It is true they allege they are taxpayers in the city and own collectively about one hundred thousand dollars' worth of property in the city subject to taxation; but, if the city charter does not authorize any tax on property to pay said bonds or the interest accruing thereon, then it is conceded by plaintiffs that they have no standing in court, and the demurrer must be sustained. And this point is not as plaintiffs assume, that plaintiffs have not capacity to sue. It is that they do not show any interest in the subject matter of the suit, no present or prospective injury to themselves. This point is raised by a general demurrer.

A brief examination of the charter will put this question at rest. The first subdivision of section 37 of

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the charter empowers the council to assess, levy, and collect taxes for general municipal purposes each year upon all property, both real and personal, which is taxable by law for state and county purposes. The terms "general municipal purposes," import no more than taxation to carry on city government, that is to pay the necessary fees and salary of officers, and to discharge the necessary expenses usual in the ordinary administration of the affairs of the city. It is evident those terms do not confer any power to levy taxes to meet the extraordinary expenses which may be incurred by the council in erecting or purchasing waterworks, electric-light plant, and the laying of suitable sewers, for the reason that other provisions of the charter prescribe the method of raising money to meet such expenses.

After empowering the city council to establish water rates and to provide for the monthly payment in advance, of such rates, the charter continues: "All moneys collected from water rates shall be kept separate from all other funds, and shall be known as the water fund, and shall only be used to pay the costs incurred by the city in operating such waterworks and extending and improving the same, and to pay the semi-annual interest on the bonds issued under this act, and all the surplus collected from water rates shall go to create a sinking fund with which to pay the principal on such bonds at maturity." Here, then, is a separate fund specially set apart to pay the interest on these bonds as it accrues and to create a sinking fund for their payment at maturity. This is the only provision made by the charter for their payment, and we insist that the court must assume that it is adequate, as it doubtless is, and also exclusive. We do not believe the court can or will try the question of the sufficiency of this fund at this time. It was the duty of the legislature to make adequate provision for the

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payment and the redemption of the bonds which it authorized the city to issue, and it must be assumed that it has discharged that duty. The court cannot, therefore, do what the plaintiffs ask—adjudge that the special fund created and set apart for the payment of these bonds is insufficient. The most that can be said on this subject at this time is, that the fund provided is presumptively adequate, but if the future should determine that it is insufficient, it will become the duty of the legislature to make further provision. It can be no part of the court's duty in this preliminary way, to anticipate the future, and by such anticipation destroy the utility of the act. The plaintiff's contention is, therefore, born of their fears for the future, not the present—that is, that the legislature may some time “in the future” find it necessary to levy a tax to aid the fund which the present act provides; but it can hardly be contended that a court of equity can make such groundless fears a foundation upon which to rest its jurisdiction.

Our contention upon this point may be further illustrated by the maxim, “*Expressio unius est exclusio alterius*.” The payment of the bonds is provided for in a particular way. This excludes every other. The fund to be used is derived from a particular source. This of itself excludes every other: *U. S. v. Macon Co.* 99 U. S. 582; *McFarland's Estate*, 26 Pac. 185; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Pico v. Sunol*, 6 Cal. 294; *Canfield v. Tobias*, 21 Cal. 349; *Englund v. Lewis*, 25 Cal. 340; *Boyce v. California Stage Co.* 25 Cal. 475; *Patton v. Placer Co.* 30 Cal. 175–178.

The objection that the waterworks are inadequate to supply the inhabitants with water and that the same are not worth the price agreed upon are equally unsound. Those are matters left by the charter to the discretion of the common council. That body must determine whether the waterworks are of a character and capacity sufficient

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to furnish the city and inhabitants thereof with an abundance of good, pure, and wholesome water, etc.: 2 Dillon, Mun. Corp. § 94; *Railroad Co. v. Evansville*, 15 Ind. 395; *Kelly v. Milwaukee*, 18 Wis. 83; *Slack v. Railroad Co.* 13 B. Mon. 1; *Bridgeport v. Railroad Co.* 15 Conn. 475; *Harrison v. Baltimore*, 1 Gill (Md.), 264; *Cincinnati v. Gwyne*, 10 Ohio, 192; *Markle v. Akron*, 14 Ohio, 586.

Where a municipal corporation is entrusted with the execution of a power and is not confined to any particular mode, but has a discretion in the choice of means, a plain case of abuse must be shown, resulting in an injury to the petitioner, to warrant an injunction against the corporation: *Page v. St. Louis*, 20 Mo. 136; *Colton v. Hanchett*, 13 Ill. 615; *Bush v. Carbondale*, 78 Ill. 74; *Mayor of Baltimore v. Gill*, 31 Md. 375; *Holland v. Baltimore*, 11 Md. 186, 59 Am. Dec. 195; *Dodd v. Hartford*, 25 Conn. 232; *Shelton v. School Dist.* 25 Conn. 224; *Lockwood v. St. Louis*, 24 Mo. 20; *Deane v. Todd*, 22 Mo. 90; *Mayor v. Meserole*, 26 Wend. 132; *U. P. Co. v. Fyan*, 2 Wyo. 408; *U. P. Co. v. Cheyenne*, 113 U.S. 516; *Poillon v. Brooklyn*, 101 N. Y. 132; *Couldson v. Portland*, 1 Deady, 481.

In respect to the legislative functions of a municipal body the courts are bound to presume that they will exercise any discretion with which they are clothed properly, and that they had sufficient reasons for doing an act the result of such discretion: *Railroad Company v. Mayor, New York*, 1 Hilton, 562; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508, 24 Am. Rep. 756. Thus, for example, if a city has power to grade streets, the courts will not inquire into the necessity of the exercise of it or the refusal to exercise it, nor whether a particular grade adopted, or a particular mode of executing the grade is judicious: *Hovey v. Mayo*, 43 Me. 322; *Benjamin v. Wheeler*, 8 Gray, 409-413; *Richmond v. McGirr*, 78 Ind. 192. So, if a city has power to build a market-house, the courts cannot

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inquire into the size and fitness of the building for the object intended: *Spaulding v. Lowell*, 23 Pick. 71-80. So where a city has power to lease real estate at a reasonable rent, the council is to determine what is reasonable, and their discretion in the absence of fraud cannot be judicially revised: *Shank v. Mayor*, 69 N. Y. 444. So, in the absence of fraud, the court refused to interfere by injunction with the action of the city council in agreeing to rent a room for city purposes for twenty years and to pay for the same in advance: *Moses v. Risdon*, 46 Iowa, 251.

Mr. John Kelsay (Messrs. *M. S. Woodcock* and *Wm. Yates* on the brief), for Respondents.

Opinion by MR. JUSTICE BEAN.

1. It is first insisted, in support of the demurrer, that under the charter the loan evidenced by the bonds issued for the purpose of raising money to erect or purchase waterworks is not a debt or obligation of the city for the payment of which money raised by taxation can be used, and therefore the plaintiffs do not show any interest in the subject matter of the suit, or any injury to themselves, present or prospective, from the contemplated issue of bonds or the purchase of the waterworks. This argument is based upon that provision of the charter, which, after authorizing the council to construct or purchase, keep, conduct, and maintain waterworks, to furnish the city and its inhabitants with pure, wholesome water, and for such purpose to issue and dispose of the bonds of the city, the par value of which shall not exceed fifty thousand dollars, whereby the city shall be held and considered in substance and effect to undertake and promise to pay to the bearer of each of said bonds, at the expiration of such time as the council shall prescribe, not exceeding twenty years, the sum named therein, with

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interest at the rate of six per cent per annum, and to establish and collect water rates, further provides that "all moneys collected from water rates shall be kept separate from all other funds, and shall be known as the 'water fund,' and shall be used only to pay the costs incurred by the city in operating such waterworks, and extending and improving the same, and to pay the semi-annual interest on the bonds issued under this act, and all the surplus collected from the water rates shall go to create a sinking fund with which to pay the principal of such bonds at maturity." The argument is that by this provision of the charter the money collected for water rates is made a special fund for the payment of the interest on the bonds it accrues, and for the creation of a sinking fund for their payment at maturity, and that it is the only fund out of which such bonds or the interest thereon can be paid. As a general rule, when the legislature authorizes a municipality to contract a debt, and issue bonds therefor, it is to be inferred that it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference; and, although a special tax or fund may be provided, the bondholders' remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way. The bonds, when issued, become a debt of the corporation for which it is primarily liable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of the general fund of the corporation. In *United States v. County of Clark*, 96 U. S. 211, the county had subscribed for stock of a railroad company, and issued its bonds in payment therefor pursuant to the law which authorized the levy of a special tax to pay them, "not exceeding

one-twentieth of one per cent upon the assessed value of taxable property for each year," but contained no provision that only the fund so derived should be applied to their payment. On an application for a writ of mandamus by the holders of the bonds to compel the clerk of the county to draw a warrant on the county treasurer, payable from the general fund of the county, for the balance due on the bonds after the application of the proceeds of a special tax, the court held that the bonds were debts of the county as fully as any other liability, the special tax being merely an additional provision for their payment, and for any balance remaining due thereon of either principal or interest, after the application of the proceeds of the special tax, the holders were entitled to payment out of the general fund of the county.

In *Lowell v. Boston*, 111 Mass. 460, 15 Am. Rep. 39, the supreme court of Massachusetts, in speaking of bonds which the city of Boston was authorized to issue by an act of the legislature to enable it to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city destroyed by fire in November, eighteen hundred and seventy-two, which act established a sinking fund for the payment of such bonds, to consist of all premiums on the sale of bonds above their par value, of all receipts of interest on loans made over and above the interest paid on such bonds, and of all payments of the loans made under the authority of the act, said: "The issue of the bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." To the

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same purport is *State v. Milwaukee*, 25 Wis. 122; *Parsons v. City of Charleston*, 1 Hughes, 282, Fed. Cas. No. 10, 774; *Knox County Court v. United States*, 109 U. S. 229, 3 Sup. Ct. Rep. 131; *United States v. New Orleans*, 98 U. S. 381. "Indeed," as was said by Mr. Justice FIELD in the case last cited, "it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that payment shall not be left to its caprice or pleasure. When, therefore, power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it."

Now, in this case there are no express words in the charter excluding the implication that the bonds to be issued for waterworks may be paid out of the general fund of the city; on the contrary, it clearly appears that the provision of the charter making water rates applicable to the payment of the bonds was only intended as an additional provision for the payment of the proposed new debt, and not as a denial to the bondholders of the right to resort to the ordinary revenues from which payment of the debts of the city is made. It does not, in express terms, or by implication, import that they were thereby to be precluded from looking to the city for the payment of the debt. By the terms of the act authorizing the bonds it is expressly provided that the city shall "be held and considered in substance and effect to undertake and promise, in consideration of the premises, to pay to the bearer of each of the said bonds, at the expiration of such time as the council shall prescribe, not exceeding twenty years, the sum named therein, in gold coin of the United States, together with interest thereon in like gold

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coin at the rate of six per cent per annum, payable half yearly as provided in said coupons." The plain import of this language is that the city is to become primarily liable for the payment of the bonds issued by it, and nothing in the language of the charter in any respect affects this primary liability. The bonds, when issued will create a debt of the city as fully as any other liability, for the payment of which the property of its inhabitants may be subject to taxation. By its charter the city is authorized and empowered to assess and collect taxes for general municipal purposes, not to exceed one half of one per cent each year, upon all the property within its limits, and the fund thus raised may be used for the payment of interest or principal upon the bonds proposed to be issued, if the money collected from water rates should prove insufficient; for nothing is more important to the welfare of a municipality than a regular supply of good, wholesome water for its inhabitants, which can best be secured through the instrumentality of well equipped waterworks, and hence the construction and operation of such works is held to be a general municipal purpose: *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924; *Metcalf v. City of Seattle*, 1 Wash. 297, 25 Pac. 1010. It seems to us, therefore, that the contemplated purchase of the waterworks, and the issue of bonds by the city of Corvallis, involved the possibility, if not the probability, of providing for their payment by taxation, and therefore plaintiffs are interested in and have a right to maintain this suit. The case of *United States v. County of Macon*, 99 U. S. 582, relied upon by the appellant, is not in point, for in that case, by the act authorizing the debt, and the general statute in force at the time, the power of taxation for its payment was, in the opinion of the court, limited to the special tax designated in the act, and such

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other taxes applicable to the subject as then were, or might thereafter by general or special acts, be permitted, and hence the court refused to compel the county by mandamus to levy a tax for the payment of such bonds beyond the amount so authorized.

2. Having concluded that the plaintiffs are proper parties, we now pass to the question whether, under the admitted facts, the plaintiffs are entitled to the relief prayed for. The object of this suit is to prevent the purchase by the city of the plant of the Corvallis Water Company, and, as one reason therefor, the complaint alleges, and the demurrer admits, that such plant is not worth to exceed the sum of ten thousand dollars, is inadequate in capacity, faulty in construction, and wholly insufficient in every respect to supply the city and its inhabitants with water; and that to pay twenty-eight thousand dollars therefor, as contemplated by the city, will be an unreasonable and flagrant waste of eighteen thousand dollars of the city's resources, and a great damage to the city, to these plaintiffs, and other taxpayers. The defendants having seen fit to rest their case upon the facts as stated in the complaint, the only question is whether, under these facts, the plaintiffs are entitled to have the contemplated purchase of the waterworks perpetually enjoined. If so, the complaint states a cause of suit, and the decree must be affirmed, whether the objections to the validity of the various proceedings of the council looking to the sale of bonds by the city are well taken or not. The contention for defendant is, that the erection or purchase of waterworks is by the charter left entirely to the discretion of the council, and that the courts have no jurisdiction or authority to interfere with such discretion. No principle of equity jurisprudence is, perhaps, better established than that when the officers of a municipal corporation are clothed with a

discretionary power, and are acting within the scope of such power, a court of equity will not sit in review of their proceedings, or interfere by injunction, at the suit of a private citizen, unless fraud is shown, or the power or discretion is being manifestly abused to the oppression of the citizen. The fact that the court would have exercised the discretion in a different manner will not warrant it in interfering: 2 High on Injunction, § 1240; *Spring Valley Water Works v. City of San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, 6 L. R. A. 756, 22 Pac. 910, 1046.

Now, in this case the matter of erecting or purchasing waterworks is, by the charter of Corvallis, committed to the judgment and discretion of the council, and whether they act wisely or unwisely in so doing, it is not the province of a court of equity to interfere, so long as they exercise such judgment or discretion in good faith; but the gist of the complaint upon this subject is that they have not exercised their judgment and discretion in such manner, but that arbitrarily, and without regard to the rights of the city or its taxpayers, they have agreed and are about to pay twenty-eight thousand dollars for a plant worth but little more than one third that amount, and wholly inadequate and insufficient for the purpose for which it is intended. Regarding this as true—being admitted by the demurrer—it evidently amounts to a legal fraud, and is such a manifest and gross abuse of power as will be prevented by an injunction at the instance of a taxpayer. Although the acts of the council are not charged to have been fraudulent, and the term fraud is not used in the complaint, facts are stated and alleged which show such a gross and manifest abuse of discretion, and disregard for the rights of the taxpayer, as amount to the same thing. Fraud is not a fact, but a conclusion of law from facts, and the term may not be

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used at all in the pleadings if facts are averred which show fraud as a conclusion of law: Bliss, Code Pleading, § 211; *Hess v. Young*, 50 Ind. 379. The officers of a municipality in many respects sustain the relation of trustees to the citizens and taxpayers, and, while they are necessarily invested with large discretionary powers in the conduct of the affairs of the corporation, with which the courts will not interfere, it is too clear for argument that they cannot, in total disregard of the rights of the citizens and taxpayers, waste and misapply the public funds, as the complaint alleges is contemplated in this case. By their demurrer the defendants admit that they intend and contemplate, as the representatives and trustees of the city, to pay twenty-eight thousand dollars out of the public funds for property worth not to exceed ten thousand dollars, and wholly inadequate and insufficient for the purpose for which it is designed, and this admission shows such an unwarranted invasion of the rights of the taxpayer as will be prevented by an injunction at the instance of such taxpayer. This being so, the complaint states a cause of suit, and the demurrer was properly overruled, whether the objection to the validity of the bonds is sound or not, and we do not, therefore, deem it necessary to consider such objection at this time. For the reasons stated, the decree of the court below is affirmed.

AFFIRMED.

Statement of the case.

[Argued February 21; decided April 17, 1894.]

VAN BIBBER v. FIELDS.

[S. C. 35 Pac. 526.]

25	527
31	473
33	56
22	505

1. **PLEADING—REPLY—COUNTERCLAIM.**—In an action for work and labor done, in which a counterclaim for different items is set up, a reply alleging that the amounts of the items are less than that set forth in the counterclaim, and have been fully paid, without asking any affirmative relief, is not inconsistent with the complaint.
2. **REFEREE'S REPORT—TRANSCRIPT.**—A referee's report and a motion to set aside a report are not part of the transcript, (*Osborn v. Graves*, 11 Or. 526, approved and followed,) and any errors by the referee or in his report must be incorporated into the bill of exceptions before they can be reviewed on appeal.

APPEAL from Lane: GEO. H. BURNETT, Judge.

This is an action by J. H. Van Bibber against Hugh Fields to recover the sum of nine hundred and eighty dollars and fifty cents for work and labor alleged to have been performed by plaintiff for the defendant. The answer denies all the allegations of the complaint, except certain items for labor, aggregating two hundred and thirteen dollars and twenty-five cents, and sets up, as a counterclaim, divers and sundry items, among which are thirty dollars for wood, twenty dollars for the use of a wagon, fifty dollars for pasturage, grain, and feed for plaintiff's horse, twenty dollars for the use of a buggy, and one hundred and ninety-six dollars for the rent of a house. The reply, among other things, denies that defendant furnished plaintiff any wood, except as thereafter stated, or that said wood was reasonably worth the sum of thirty dollars, or any other or greater sum than five dollars. It admits that defendant furnished plaintiff a wagon and team for hauling wood, but denies that the use thereof was reasonably worth the sum of twenty dol-

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lars, or any other greater sum than seven dollars; and alleges that plaintiff has more than paid for said wood and use of the wagon by hauling, sawing, splitting, and putting wood in defendant's woodhouse. It also denies that defendant furnished any grain or feed for plaintiff's horse, and avers that the reasonable value of the pasturage was eight dollars, which was fully paid by the use of the horse by the defendant. It also denies that the reasonable value of the use of the buggy was any greater amount than twelve dollars, and alleges that the same was fully paid by work and labor done and performed by plaintiff for defendant. As a further and separate defense it avers, that about the first of October, eighteen hundred and eighty-nine, defendant gave plaintiff's wife the use of the house, for which he has charged plaintiff the sum of one hundred and ninety-six dollars, and of a garden spot and all the fruit she wanted so long as she desired to occupy and use the same, and in consideration thereof plaintiff's wife and children were to look after and care for the house and furniture therein, and care for and feed defendant's stock, which they did, and during such time plaintiff's wife washed and cared for defendant's clothing, and boarded him, all of which was done in consideration of the use of the house, garden, and fruit, and that such services by plaintiff and his family were more than sufficient to pay for the use of the same. A motion to strike out the affirmative allegations of the reply, and a demurrer directed to the same matter, having been overruled, the cause was referred to Judge Powell, to take and report an accounting, who reported that there was due plaintiff the sum of five hundred and sixteen dollars and thirty-one cents, which report being confirmed by the court, a judgment was rendered in accordance therewith, and hence this appeal.

AFFIRMED.

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Messrs. Geo. W. Wright, Reuben S. Strahan, and A. A. Tussing, for Appellant.

Mr. H. C. Watson (Messrs. D. R. N. Blackburn and J. J. Whitney on the brief), for Respondent.

Opinion by MR. JUSTICE BEAN.

The notice of appeal contains numerous assignments of error, but as the greater portion of them seem to be based upon some supposed ruling of the trial court which is not made a matter of record by the bill of exceptions or otherwise, they are unavailable on appeal, and will be passed over without further notice.

1. The first question presented by the record is as to the correctness of the action of the trial court in overruling the defendant's motion to strike out the affirmative matter in the reply, and in not sustaining a demurrer thereto. The defendant contends that such affirmative matter is inconsistent with, and enlarges, the cause of action stated in the complaint, and is in effect stating a new cause of action. In this he is manifestly mistaken; the new matter in the reply is pleaded solely as a defense to the counterclaims set up by the defendant. No affirmative relief is asked or demanded, nor upon the facts pleaded would plaintiff be entitled to such relief, because it is purely defensive in its character, and is so pleaded. The affirmative matter is simply a statement that certain items pleaded as a counterclaim were fully paid and discharged before the commencement of the action, and that, by the arrangement under which the plaintiff and family occupied the house, no rent was to be charged or paid therefor. The rule of law that a reply cannot change or enlarge the character of the action stated in the complaint, or be used to supply omissions of necessary averments therein, is well settled and not

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disputed, but it has no application to this case. The plaintiff by his reply had a right to allege any new matter not inconsistent with the complaint, constituting a defense to any affirmative matter pleaded in the answer, and that is all he did in this case.

2. Several other assignments of error relate to the supposed action of the trial court in overruling defendant's motion to set aside the report of the referee, and in sustaining divers and sundry rulings made by him during the progress of the trial; but as such alleged errors do not appear by the bill of exceptions and the report of the referee, and the motion to set it aside, being no proper part of the transcript (*Osborn v. Graves*, 11 Or. 525, 6 Pac. 227), we have no means of ascertaining whether the errors assigned in the notice of appeal are well founded or not. It was earnestly insisted at the argument that the case of *Osborn v. Graves* is founded upon a misconception of the statute, and ought to be overruled. If the question was *res integra* I am not prepared to say what view the court, as now constituted, might entertain, but as it is only a question of practice we do not feel authorized to disturb that decision, whatever doubts we may entertain as to its soundness. It is true the record in this case does contain what purports to be a bill of exceptions, but it goes only to alleged errors of the referee, and not to any ruling claimed to have been made by the trial court. Nor does it appear from the bill of exceptions that the alleged errors of the referee were presented to or passed upon by the trial court, or urged as an objection to the confirmation of the report. If the defendant was dissatisfied with the rulings of the court in confirming the report of the referee, or in overruling his objections thereto, or in sustaining some ruling or want of ruling of the referee, made during the progress of the hearing before him, he should have embodied the same in the bill

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of exceptions, and, not having done so, we have no alternative but to affirm this judgment.

AFFIRMED.

[Argued April 3; decided April 24, 1894.]

KANNE v. OTTY.

[S. C. 36 Pac. 537.]

1. **BOUNDARIES—LATENT AMBIGUITY—PUBLIC LANDS—PAROL EVIDENCE.**—Where there is an ambiguity in the descriptive words of a grant respecting the quantity, character, or duration of the estate conveyed, evidence of the intention of the parties is admissible to interpret it; and such an ambiguity exists where a boundary line of a government patent was not in fact surveyed on the line there indicated.
2. **PUBLIC LANDS—INTENTION OF PARTIES.**—The intention of the parties to a patent to land under section 5 of the act of congress approved September twenty-seventh, eighteen hundred and fifty, providing for granting to settlers one hundred and sixty acres of land, must be ascertained from the actual survey as originally made upon the land; and the description of the premises by courses and distances must yield to visible or ascertained movements.
3. **EVIDENCE OF ADVERSE POSSESSION.**—On an issue as to the location of a boundary line, plaintiff relied on the establishment of a county road on the boundary claimed by him, and the removal by his grantor of a fence thereto for about two thirds of the distance across the claim, so as to inclose part of the land in dispute, and the cultivation of the land so inclosed. There was no direct evidence that such grantor intended to claim the tract adversely, and it appeared that when a surveyor, after plaintiff purchased, discovered the claim did not contain the quantity of land described in the patent because it did not include the strip of land in dispute, the grantor paid, and plaintiff accepted, three hundred dollars in satisfaction of the deficiency and breach of warranty. *Held*, that adverse possession was not shown.

APPEAL from Clackamas: THOS. A. McBRIDE, Judge.

This is a suit by August C. and Wilhelmina Kanne against William and Agnes Otty to quiet title. The plaintiffs allege in their complaint that they are the

25	531
26	496
30	537
33	626
25	531
29	107
25	531
30	474
25	531
44	28

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owners in fee and in possession of the William S. Buckley donation land claim in sections twenty-eight and thirty-three, township one south of range two east, in Clackamas County, and that the defendants unlawfully claim some interest in a portion of said claim, three chains in width and thirty-four and one half chains in length, extending across the east end thereof. The defendants, after denying the allegations of the complaint, allege that the disputed tract forms no part of the Buckley claim, but that it is a part of lot three, section twenty-eight, and of lot one, section thirty-three, in said township, joining the Buckley claim on the east, of which they are the owners in fee and in possession. The reply having put in issue the allegations of new matter contained in the answer, the cause was referred to Charles E. Runyon, Esq., to take and report the testimony, which having been done, the court found for the defendants, decreed that they were the owners and entitled to the possession of said tract, and allowed them their costs and disbursements, from which decree the plaintiffs appeal.

AFFIRMED.

Mr. Greenbury W. Allen (*Mr. John F. Caples* on the brief), for Appellant.

Mr. A. S. Dresser (*Mr. G. E. Hayes* on the brief), for Respondent.

Opinion by MR. JUSTICE MOORE.

The plaintiffs contend that the said Buckley claim is forty-six and one half chains in length and thirty-four and one half chains in width, containing one hundred and sixty and forty-three hundredths acres, while the defendants contend that the east boundary of said claim, as

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originally surveyed, was located but forty-three and one half chains from the west boundary, and that the claim contains only one hundred and fifty and eight hundredths acres. The plaintiffs, to support their contention, offered in evidence a certified copy of the original field notes of said Buckley claim, from which it appears that the survey was made November eighth, eighteen hundred and fifty-seven, by beginning at the post at the corner to sections twenty-eight, twenty-nine, thirty-two, and thirty-three in said township; thence running north on the west boundary fourteen and one half chains to the northwest corner; thence returning to the initial point, and running south on the west boundary twenty chains to the southwest corner; thence east on the southern boundary forty-six and one half chains, where a post was set for the southeast corner; thence north on the east boundary and at a point fifteen and seventy-five hundredths chains from the southeast corner the line passed through a fir thirty inches in diameter; at twenty chains it intersected the line between sections twenty-eight and thirty-three, four and twenty-four hundredths chains east of the quarter post, and at thirty-four and one half chains a post was set for the northeast corner, from which a fir twenty-four inches in diameter bears south sixty-two degrees east fifty-two hundredths chains, and a fir thirty-six inches in diameter bears south seventy-seven degrees west eighty-six hundredths chains; and thence west on the north boundary forty-six and one half chains to the northwest corner. The United States patent to William S. Buckley, and the mesne conveyance of said donation claim to the plaintiffs, adopt the description of the premises given in the field notes. The evidence shows that when said claim was originally surveyed, the east end was covered with timber and brush, which have since been entirely removed, leaving no witness trees to the southeast corner; that an old fence extended south

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from a point forty-three and one half chains east of the northwest corner of the claim, across the east end thereof, to a point at the same distance east of the southwest corner; that the defendant William Otty, William Ryan, who is plaintiffs' grantor, and others, petitioned the county court of said county to establish a county road, which was surveyed April twenty-ninth, eighteen hundred and eighty-two, the line extending west along the south boundary of said lot one, thirty-three and one half chains from the southeast corner thereof, to a point forty-six and one half chains east of the southwest corner of the Buckley claim, and thence running north on what was supposed to be the boundary line between said claim and defendants' land; that after said road was located Ryan began at the south end of the old fence, and moved about two thirds of it east to the county road, making an angle at the north end, as moved, connecting it with the remaining third, which extends to the north boundary of the claim. John Meldrum testified that, as county surveyor of said county, he, at the request of Ryan, surveyed the Buckley claim after the plaintiffs had acquired the legal title thereto, by beginning at the initial point of the original survey, and found the northwest and southwest corners as originally located; that he ran east from the southwest corner forty-six and one half chains, where he set a stake at a point one and thirty hundredths chains east of the angle stake on the county road; thence north, and at the proper distance he tried to find the tree described in the field notes, but was unable to do so; that he saw a stump two or three rods out of line, but did not consider it the one sought for; that he intersected the line between sections 28 and 33 at a point six and seventy-six hundredths chains east of the quarter post, which he established, and at a point thirty-four and one half chains from the stake set for the southeast corner, he

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found it to be three and twenty-two hundredths chains east of what he concludes to be the northeast corner of said claim. At this point he found both bearing trees blown down, but corresponding in course and distance with the field notes, and by chopping into them he found surveyor's marks. He also found a stone set there for the northeast corner, which he recorded as such. After finding this corner he ran west on the north boundary, and at forty-three and fifty-two hundredths chains he arrived at the original northwest corner. John Smart, who lived on land adjoining the Buckley claim on the south, testified that while assisting Ryan to plow the fence row on the line between their claims he found, at the south end of the old fence, a decayed hardwood corner stake about three or four inches square, and about eighteen or twenty inches long, which he pulled up, and found figures on it; that Ryan said it was a corner stake and that he would put it up at the corner. S. B. Millard testified that he moved the old fence, and in doing so discovered a hardwood stake driven in the ground at the south end of it, which was pretty much decayed, and had figures on it made by a surveyor's instrument. Henry Meldrum testified that at plaintiffs' request he made a survey of the Buckley claim, and at a point forty-six and one half chains east of the southwest corner, in the course and distance given in the field notes, he found the roots of a tree that would correspond to the original witness tree to the southeast corner; that in running north from this point, at about the proper distance, and within about five feet from the line, he found the stump of a tree that might correspond with the one mentioned in the field notes, but, the tree having been cut, he could not be certain of its identity; that at thirty-four and one half chains north of a stake set for the southeast corner he found a tree approximately corresponding in course and distance

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with the witness tree to the northeast corner, but there were no surveyor's marks upon it; that he saw witness trees to a point three and twenty-two hundredths chains west of the corner established by him for the northeast corner, and that they were in the proper course and distance given in the field notes for that corner. From this evidence it would appear that the northeast corner of said claim had been established to a demonstration by the discovery of the witness trees; and the fact that the old fence reached from this corner to the stake found on the south line is a strong circumstance tending to prove that it was built on the line of the original survey. The field notes also show that the east boundary intersected the line between sections 28 and 33 at a point four and twenty-four hundredths chains east of the quarter post; and while this would be seventy-four links east of the line as claimed by defendants, it would be two and twenty-six hundredths chains west of that claimed by plaintiff. Taking these facts and circumstances into consideration, the conclusion seems irresistible that the east boundary, as originally surveyed, was run forty-three and one half chains from that of the west, and not forty-six and one half chains, as given in the field notes.

1. Where there is ambiguity in the descriptive words of a grant respecting the quantity, character, or duration of the estate conveyed, evidence of the intention of the parties at the time the instrument was executed is admissible in interpreting it: *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Wheeler v. Randall*, 6 Met. 529; *Brannan v. Mesick*, 10 Cal. 106; *Mulford v. LeFranc*, 26 Cal. 111; *Jackson v. Beach*, 1 Johns. Cases, 399. In a controversy respecting a deed containing a description which referred to a boundary line, "as surveyed by Israel Johnson and Isaac Boynton," it was contended that the premises had never been surveyed by them. The court,

in construing the reference contained in the instrument, said: "If Johnson and Boynton never made any survey, there was a latent ambiguity in the deed": *Abbott v. Abbott*, 51 Me. 575. So, in the case at bar, if the east boundary, as described in the patent to Buckley, was not surveyed on the line there indicated, a latent ambiguity existed in respect to it, and evidence was admissible to prove its original location.

2. The plaintiffs contend that it was the intention of the government of the United States to grant, and of William S. Buckley to acquire, one hundred and sixty acres of land under the provisions of section 5 of the act of congress, approved September twenty-seventh, eighteen hundred and fifty, (9 U. S. Stat. 406,) and that this intention of the parties will control courses, distances, boundary lines, monuments, and quantity, while the defendants contend that the intention of the parties is to be ascertained by the boundaries established by the original survey. Section 2396, U. S. Revised Statutes, provides that "All the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners of the sections or subdivisions of sections which they are intended to designate." In *Goodman v. Myrick*, 5 Or. 65, it was held that all claims surveyed under the act of congress, approved September twenty-seventh, eighteen hundred and fifty, were recognized as legal subdivisions, and that the true line was the one actually run upon the ground in the original survey of donation land claims. In *Vandusen v. Shively*, 22 Or. 64, 29 Pac. 76, which was a suit to establish the boundary lines of a donation land claim, BEAN, J., said: "The location of this line is a question of fact to be ascertained from the evidence. The courses and distances as given in the field notes are but descriptions which serve to assist in determining where the line was actually

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run. But, where the line can be shown from the marks and blazes on the trees, or other natural monuments or calls, the courses and distances must yield to it. In cases of this kind, the object is to follow in the 'footsteps of the surveyor' as nearly as possible. No fixed or certain rules can be laid down by which questions of disputed boundaries can be settled, but each case must depend upon its own particular facts." The intention of the parties to the Buckley patent must be ascertained from the actual survey as originally made upon the ground, and the description of the premises by courses and distances must yield to visible or ascertained monuments erected as witnesses to limit the bounds of the tract conveyed.

3. It is also contended that the plaintiffs and their grantor have been in the open, notorious, and exclusive possession of the disputed tract, claiming ownership under color of title, for the statutory period, and that this adverse possession entitled them to a decree therefor. The evidence upon which they rely to support this contention is the establishment of the county road, the removal of the fence for about two thirds of the distance across the claim, and the cultivation of the land embraced in the tract enclosed by the removal of the fence. These acts by Ryan are not of themselves sufficient to prove an adverse holding; they are at best but circumstances from which an inference to that effect may be drawn. There is no direct evidence that he intended to claim the tract adversely. When John Meldrum, in making the survey of eighteen hundred and eighty-eight, discovered the claim did not contain the quantity of land described in the patent, Ryan paid, and the plaintiffs accepted, three hundred dollars in consequence of the deficiency, and agreed to relinquish any claim they might have against him upon his warranty. This is a circum-

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stance tending to prove that Ryan was not holding or claiming to hold the tract adversely, and would seem to rebut the presumption created by his improvements. The decree is therefore affirmed. **AFFIRMED.**

[Argued April 16; decided May 3, 1894.]

HONEYMAN v. THOMAS.

[S. C. 35 Pac. 636.]

MECHANIC'S LIEN—DERRICK—FIXTURE.—A derrick erected by a tenant in a quarry by placing a post upright in a socket upon the ground with guy ropes extending from its top to stakes set in the ground, is a trade fixture, and not subject to a lien.

APPEAL from Clatsop: THOS. A. McBRIDE, Judge.

This is a suit by John Honeyman and others to foreclose an alleged mechanic's lien. The record discloses that the defendants Thomas & Hartley, having secured a lease of certain real property in Clatsop County from one Lewis, for the purpose of taking stone from a quarry thereon, made a contract with the plaintiffs, who, in pursuance thereof, manufactured and supplied the necessary castings, wire ropes, chains, dogs, and other material for the construction of a derrick, and the defendants erected the same at the quarry by placing a post upright in a socket upon the ground, having six wire guy ropes extending from its top to stakes set in the ground, and to anchor bolts imbedded in the rocks, to which post was attached a swinging boom properly connected with blocks, steel ropes, and windlass. After the completion of said derrick it was attached, together with all the material and machinery furnished by the plaintiffs, in an action brought by one M. McTigua against said Thomas &

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Hartley, and, judgment having been rendered in favor of said attaching creditor, the attached property was upon execution sold to the defendants Fisher Brothers. After the property was attached, but prior to the sale thereof upon the execution, the plaintiffs filed in the office of the county clerk of said county their notice of lien upon said derrick, materials, and machinery, and also upon Thomas & Hartley's leasehold interest in said real property, to secure the payment of four hundred ninety-six dollars and sixty-four cents, the value of said materials and machinery, and this suit was brought to foreclose said lien. Issue having been joined by the pleadings, the cause was tried by the court, which found that the property sought to be charged with the lien was movable, and not subject thereto, and decreed that the complaint be dismissed as to the defendants Fisher Brothers, and awarded them their costs and disbursements, from which decree the plaintiffs appeal.

AFFIRMED.

Messrs. Frank Spittle and Arthur C. Emmons, for Appellant.

Mr. J. Q. A. Bowlby, for Respondent.

Opinion by MR. JUSTICE MOORE.

Counsel contend that the derrick was a fixture, and would pass, in a conveyance of the realty, to the purchaser. "According to the more recent authorities," says STRAHAN, J., in *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148, "to give a chattel the character of a fixture, and to render it immovable, three things are necessary: '(1) Actual annexation to the realty or some appurtenant thereto; (2) application to the purpose or use to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties mak-

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ing the annexation to make a permanent accession to the freehold.'” It has been said that “the object, the effect, and the mode of annexation are all to be considered in determining whether any specific articles are movable fixtures”: *Leonard v. Stickney*, 131 Mass. 541. Machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil: *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. 160. The method of attachment thus becomes an indication of the tenant’s intention in placing the chattel upon the demised premises. The evidence in the case at bar shows that the derrick could and probably would have been moved from one point to another as the quarried stone were removed from the radius of the boom, and that the attachment to the soil and rock by the guy ropes was merely to steady the post, rather than to make it a part of the freehold; and hence it cannot be determined from the method of attachment that it was the intention of the parties to permanently affix the derrick to the freehold. An examination of the lease from Lewis to the defendants Thomas & Hartley fails to disclose any indication of an intention to have any machinery or other improvements placed upon the demised premises or removed therefrom, so that under none of the rules above quoted can the derrick, or materials, be deemed a fixture. There being no stipulation in the lease, the tenants could remove improvements made by them, the removal of which would not materially injure the premises or put them in a worse condition than they were in when they took possession: 1 Washburn, Real Prop. § 27; Taylor, Land and Tenant, § 550. “It is the policy of the law,” says LORD, C. J., in *Or. Ry. & Nav. Co. v. Mosier*, 14 Or. 519, 58 Am. Rep. 321, 13 Pac. 300, “to encourage

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trade, manufactories, and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery, and all such things certainly intended and calculated to promote them are treated, not as a part of the land, but as distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure." Fixtures which a tenant is allowed to disannex and take away are comprehended within two classes, or are of a mixed nature falling partly within and partaking of the nature of both. These classes are: First, those which are put up for ornament or the more convenient use of the premises, and are called domestic fixtures; and, second, those which are put up for purposes of trade, and are known as trade fixtures: *Wall v. Hinds*, 4 Gray, 270. A trade fixture, to be removable, must be either capable of being removed bodily, or taken to pieces and put up again, so as to be identically what they were before: *Ewell on Fixtures*, 95. The derrick was capable of being removed and its identity preserved by either method, and hence it comes within the removable class.

It is contended that where the machinery, instrument, or utensil is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part thereof. The courts of Pennsylvania adopted this rule in eighteen hundred and thirteen (*The Olympic Theatre*, 2 Browne, 275), and it has since been followed in that state, and the courts of California have approved the doctrine: *Merritt v. Judd*, 14 Cal. 59. But these decisions do not conform to the trend of judicial utterance on the subject. Mr. Ewell, in commenting upon this distinction, says: "In some cases, where the calling is exercised solely with reference to agricultural operations, or as a means of enjoying the benefit of the inheritance, an exception has been made, the exercise of such calling not being considered a trade within the meaning of the rule. There

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does not seem, however, to be any valid reason for this exception; and, as will be shown hereafter, the tendency of modern judicial opinion in the United States seems opposed to such distinction": Ewell on Fixtures, 102. The character of the fixtures being a mixed question of law and fact, we think the court below was fully warranted in holding that the derrick was a movable appliance, and not subject to a lien (Phillips on Mechanic's Liens, § 178, 15 Am. & Eng. Enc. 36), and the court having so found, the decree is affirmed.

AFFIRMED.

[Decided June 23, 1894.]

HYDE v. CROSS.

[S. C. 37 Pac. 59.]

BAIL BOND—DISMISSING INDICTMENT.—When a defendant has been admitted to bail after being indicted, a resubmission of the matter to the grand jury, unless, perhaps, to remedy a mere formal defect, without defendant's consent, or upon a motion or demurrer of defendant under sections 1317 and 1328, Hill's Code, releases the sureties on the bond.

APPEAL from Grant: MORTON D. CLIFFORD, Judge.

This is an action by Charles F. Hyde, district attorney, against S. L. Cross and J. W. Greenwell, on an undertaking of bail for the appearance of one Lester Greenwell to answer a criminal charge. The cause was tried before the court, without the intervention of a jury, and from the pleadings and its findings of fact it appears that on the twenty-fourth of April, eighteen hundred and eighty-eight, Greenwell was duly indicted by the grand jury of Grant County for the crime of larceny "by stealing a gelding," and admitted to bail in the sum of one thousand dollars. On the twenty-fourth of October,

Statement of the case.

eighteen hundred and eighty-nine, he gave bail for his appearance to answer the indictment, with the defendants as sureties, conditioned that he would appear and answer the indictment in whatever court it might be prosecuted, and that at all times he would render himself amenable to the orders and process of the court, and if convicted would appear for judgment and render himself in execution thereof, and if he failed so to do or perform any of the conditions of the undertaking the defendants would pay to the state of Oregon the sum of one thousand dollars, and that by reason of the execution and delivery of this bond Greenwell was released and discharged from custody. The cause was continued until the fourth day of March, eighteen hundred and ninety, at which time the court, on motion of the district attorney, and against Greenwell's protest, directed the matter to be resubmitted to the grand jury, and at the same time ordered that he be still held on the bond above mentioned. A few days afterward the grand jury returned another indictment, charging him with the crime of larceny "by stealing a horse" from the same party, at the same time and place, and of the same value as the gelding mentioned and described in the former indictment. Upon the failure of Greenwell at the subsequent term of the court to appear and answer to the second indictment the undertaking was declared forfeited and this action subsequently prosecuted to collect the penalty, which resulted in a judgment in favor of the plaintiff, from which the defendants appeal.

REVERSED.

Mr. E. H. Peery (*Mr. M. Dustin* on the brief), for Appellants.

Messrs. Geo. E. Chamberlain, Attorney-General, and *Charles F. Hyde in pro per*, for Respondent.

Opinion by MR. JUSTICE BEAN.

The judgment appealed from rests upon the power of a court, on motion of the state, to set aside a valid indictment, upon which the defendant has been admitted to bail, resubmit the case to the grand jury and hold the bail liable for the appearance of defendant to answer a new indictment if one be found. The only provision of law making bail liable for the appearance of a defendant to answer a new indictment is to be found in sections 1317 and 1328 of Hill's Code, which provide that when the original indictment is set aside on motion of the defendant, for any of the reasons specified in section 1314, or a demurrer thereto is sustained, the court may order that the case be resubmitted to the same or another grand jury, and in such case the bail remains answerable for the appearance of the defendant to answer a new indictment if one be found. But in this case no motion or demurrer was interposed by the defendant. The indictment was set aside by the court on motion of the district attorney. Indeed, the record does not show that there was any defect in the indictment which could have been taken advantage of by a motion or demurrer on the part of the defendant, or that it was resubmitted to the grand jury for the purpose of correcting some formal defect, but presumably it was resubmitted so that the state might change a material allegation, and thereby relieve itself from some possible embarrassment in being compelled to prove that the animal stolen was a gelding as charged in the first indictment. The act of the court in thus resubmitting the matter to the grand jury at the instance of the state, in our opinion, amounted to a dismissal of the indictment specified in the bail bond, and clearly operated as a discharge of the sureties. By their undertaking the sureties covenanted with the state that the defendant

Opinion of the court—BEAN, J.

should appear and answer an indictment therein stated; and when he did appear in fulfilment of that undertaking and the indictment was set aside or dismissed on motion of the district attorney, it was in effect a discharge of the recognizance and the exoneration of his bail. The agreement or contract of the sureties was that the defendant should answer a particular charge as specified in the indictment then pending against him, and the condition that the defendant would appear to answer said indictment, "and at all times render himself amenable to the orders and processes of the court," was fulfilled and satisfied by an appearance and a dismissal of the particular indictment mentioned and described in the undertaking, and cannot be construed into an obligation that the accused should appear and answer some other indictment which might be found against him. What the rule may be in the case of an undertaking for the appearance of a defendant before indictment, or when the indictment is resubmitted to a grand jury for the purpose of correcting some formal defect therein it will be time enough for us to consider when the question is presented, but no such question is made on this record. It follows from what has been said that upon the findings of fact the court below was in error in its conclusions of law, and the judgment must be reversed and the cause remanded with directions to enter judgment in favor of the defendants. It was suggested that the judgment had been executed and therefore we should direct that restitution be made defendants, but this suggestion is wholly outside of the record, and hence presents no question for our consideration. The record before us does not disclose that the judgment of the court below has been executed or that any steps have been taken looking to its enforcement. The cause will therefore be remanded to the court below for such further proceedings as may be necessary and proper not inconsistent with this opinion.

Statement of the case.

[Decided June 28, 1894; rehearing denied.]

PARSONS v. HARTMAN.

[S. C. 37 Pac. 61.]

INJUNCTION—SALE OF EXEMPT PROPERTY ON EXECUTION.—A suit by a judgment debtor will not lie to enjoin the sale of his personal property under execution upon the ground that it is exempt by law from sale under judicial process, unless the property possesses a special value to the judgment debtor alone, such as a keepsake, or a memento of some kind, the loss of which cannot be compensated in damages, since the judgment debtor has an adequate remedy at law for the unlawful seizure or detention except as to property possessing such special value.

APPEAL from Umatilla: MORTON D. CLIFFORD, Judge.

This is a suit by William Parsons to restrain the defendants from selling exempt personal property upon execution. The plaintiff, in substance, alleges that the defendant, George A. Hartman, having obtained a judgment against him in the circuit court of Umatilla County, Oregon, caused an execution to be issued thereon, and delivered to the defendant William J. Furnish, the sheriff of said county, who, in pursuance of the direction of his codefendant, levied upon necessary wearing apparel of the plaintiff and his family, and upon the household goods, furniture, utensils, books, library, tools, implements, and apparatus necessary to enable him to carry on his profession of an attorney at law, by which he earns a living; that at the time of said levy he was a householder of said county, and as such selected and reserved as exempt from execution and sale under said writ all said personal property, and delivered to said sheriff a schedule thereof with the reasonable value of each article set opposite thereto, amounting in the aggregate to five hundred and fifty dollars and thirty cents; but that said sheriff, acting under the direction of his codefendant,

Opinion of the court—MOORE, J.

advertised and was threatening to sell all said property to his irreparable injury; that he had no plain, complete, or adequate remedy at law for the injury threatened, and prays an injunction restraining said sale. The defendants demurred to the complaint, alleging that it did not state facts sufficient to constitute a cause of suit, and that the court had no jurisdiction of the subject matter thereof, and the demurrer having been overruled, they refused to further plead, whereupon the court by decree made the temporary injunction which had been granted perpetual, and awarded the plaintiff his costs and disbursements, from which decree the defendants appeal.

REVERSED.

Messrs. Bailey & Balleray, for Appellants.

Mr. William Parsons, pro se.

Opinion by MR. JUSTICE MOORE.

Counsel contend that the plaintiff has a plain, speedy, and adequate remedy at law, and that equity will not entertain jurisdiction to enjoin the sale upon execution of personal property that is exempt therefrom. There is a conflict of authority upon the right of a judgment debtor to enjoin the sale of his personal property under execution upon the ground that it is exempt by law from sale under judicial process. It has been held in Texas that a sale of personal property which is exempt from execution may be restrained at the suit of the judgment debtor: *Nichols v. Claiborne*, 39 Tex. 363; *Alexander v. Holt*, 59 Tex. 205; *Stein v. Freiberg*, 64 Tex. 271; but Mr. Freeman, in his work on Executions (Vol. 2, § 439, 2d Ed.), in commenting upon the rule established in *Nichols v. Claiborne*, says: "No reason for the decision was given, and we doubt whether any sufficient

Opinion of the court—MOORE, J.

reason can be found. The remedy at law, where exempt personal property is seized, is in most, and perhaps in all, cases adequate for the protection of the interests of the claimant." The rule announced in Texas has been adopted in Nebraska, (*Cunningham v. Conway*, 25 Neb. 615, 41 N. W. 452,) where the court gives the following statement and reason for its decision: "The plaintiff alleges in his petition that he possesses neither lands, town lots, nor houses, subject to exemption as a homestead, and that he filed an inventory of all his property with the officer, who refused to call appraisers to appraise the same. If these statements are true, the debtor might have compelled the officer to call appraisers, or have brought an action against him for the failure to perform his duty, yet he is not restricted to these remedies. The property being exempt, the debtor is entitled to the peaceable possession of the same, and the officer may be enjoined from wrongfully depriving him of his property, as the officer is proceeding illegally under a claim of right": *Johnson v. Hahn*, 4 Neb. 149; *Mohawk Railroad Co. v. Artcher*, 6 Paige, 83; *Belknap v. Belknap*, 2 John. Ch. 463. In *Johnson v. Hahn* an injunction was granted to restrain the sale of real estate for delinquent taxes, which could only result in a conveyance creating a cloud upon title. In *Mohawk Railroad Co. v. Artcher* the defendant sought to dissolve an injunction which restrained him from opening a private way across plaintiff's real property. The court continued the injunction for the reason that the act complained of was not a mere trespass, but an attempt to exercise a continued right of passing across and through the complainant's premises, to the permanent injury of the property. The case of *Belknap v. Belknap* was a suit to enjoin the defendant from lowering the outlet of a pond which furnished water to operate plaintiff's mill. The court found that it was not a case

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of an ordinary trespass impending, but one great and special, leading to lasting mischief and the destruction of the estate, and tending to promote a multiplicity of suits, and perpetually enjoined the threatened injury. It will thus be seen that each case cited in support of the rule adopted in *Cunningham v. Conway*, *supra*, 25 Neb. 615, 41 N. W. 452, related to injunctions granted to restrain the creation of clouds upon title or to prevent trespasses upon real property.

In *Baxter v. Baxter*, 77 N. C. 118, it was held that injunction was not the proper remedy of the judgment debtor to determine the title to exempt personal property seized under execution. "Upon principle," says Mr. High in his work on Injunctions, § 122, in discussing the right of the judgment debtor to enjoin the sale of exempt personal property under execution, "it is difficult to perceive any satisfactory reason for interfering by injunction in such cases, since adequate relief may usually be had by an action at law." Section 380, Hill's Code, provides that "the enforcement or protection of a private right, or the protection of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law." Sections 132-143 furnish such a remedy at law for the recovery of personal property, and section 214 authorizes a jury to award damages for an unlawful seizure of such property. The owner of a chattel having a complete remedy at law for its unlawful seizure or detention, equity will not entertain jurisdiction at his suit to recover possession of it, except where it has a certain, special, extraordinary, and unique value, impossible to be compensated for by damages: 1 Pomeroy's Equity, § 177. And if it appeared from the complaint, in the case at bar, that any article of personal property levied upon by the defendants possessed a special value to the plaintiff alone,

Points decided.

such as a keepsake or memento of any kind, the loss of which could not be compensated in damages, equity would interfere to prevent its sale. Where an unlawful and oppressive seizure of exempt property has been made upon execution, the claimant, under ordinary circumstances, may safely risk his cause to the keen sense of justice inherent in mankind, and feel assured that a jury will by its verdict award him damages for the injury sustained. The plaintiff having, under the statute, a complete remedy at law for his injury, and nothing appearing in the record to entitle him to invoke the interposition of a court of equity, the decree of the court below is reversed, the demurrer sustained, and the complaint dismissed.

REVERSED.

[Decided June 28, 1894.]

LOW v. RIZOR.

[S. C. 37 Pac. 82.]

1. IRRIGATION — RIGHT TO INCREASE APPROPRIATION. — A prior appropriator of water is entitled to a sufficient quantity to irrigate his land, and he may increase the appropriation to keep pace with the additional area brought under cultivation, if it is done with reasonable diligence; but where he fails for a number of years to increase the cultivated area, he cannot then increase the appropriation to the injury of appropriators whose rights have accrued in the mean time. *Cole v. Logan*, 24 Or. 804, cited and approved.
2. IRRIGATION — HOW THE RIGHT OF APPROPRIATION IS DETERMINED. — The right of appropriation is determined by the use made of the water, and not by the amount diverted onto the land, and will be limited to the amount used within a reasonable time for some useful industry.
3. APPROPRIATION OF TRIBUTARIES. — An appropriation of the waters of a stream to a beneficial use is an appropriation of its tributaries. *Low v. Schaffer*, 24 Or. 239, approved and followed.

APPEAL from Baker: MORTON D. CLIFFORD, Judge.

25	551
27	6
25	551
30	87
30	90
25	551
35	285
25	551
37	261
25	551
39	75
39	126
25	551
41	218
25	551
42	58
25	551
44	395

Statement of the case.

This is a suit by Leonard Low to enjoin John Rizor from diverting the waters of Alder Creek, which flows in a natural channel through his land, and thence in an easterly direction through plaintiff's adjoining land. The facts are that the plaintiff, in eighteen hundred and sixty-six, settled upon a tract of unsurveyed public land, and enlarged a ditch thereon, by which the waters of Alder Creek had been appropriated by a former occupant of said tract, and in eighteen hundred and sixty-eight dug another ditch, and by them has diverted the water from said creek, and appropriated it to irrigate his cultivated land, consisting of about fifty-five acres of meadow and five acres of orchard, which he has constantly occupied since the date of his settlement; that the township in which said land is situated having been surveyed in eighteen hundred and seventy-four, and the plat thereof having been filed in the local land office of the district May first, eighteen hundred and seventy-five, the plaintiff made a homestead filing upon the north half of the southwest quarter, the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section thirty-four in township ten south of range forty-two east of the Willamette Meridian, containing one hundred and sixty acres, and embracing his cultivated land, and on March first, eighteen hundred and ninety-three, received a patent from the United States for said tract; that about eighteen hundred and sixty-two one C. W. Herman settled upon an adjoining tract of public land, commonly called "Straw Ranch," now owned by the defendant, built a house, and dug a ditch on the south side of said creek, capable of diverting about twenty inches of water, and appropriated a part of the water to irrigate a small garden, and on May third, eighteen hundred and sixty-four, he conveyed all his interest in Straw Ranch to Hiram Huffman, who that

Statement of the case.

year dug another ditch on the north side of said creek, capable of diverting about fifty inches of water, and appropriated a part of it to the irrigation of another about the first of July, when it dries up, but that he has not used the water from Kitchen Creek more than three or four years; that in eighteen hundred and ninety he irrigated a small garden by diverting the waters of a spring which discharged into Alder Creek, and in the following year he dug another ditch from Alder Creek which diverts about four inches of water; that the defendant since eighteen hundred and eighty-four has increased the area of his cultivated land from two to forty acres, and, with the water so diverted, raises excellent crops of hay, grain, fruit, and vegetables, but, deprived of the use of the water, his land would be rendered nearly valueless.

The plaintiff for cause of suit alleges a prior appropriation of all the waters of said Alder Creek, and an unlawful diversion by the defendant, who, for answer, after denying the material allegations of the complaint, alleges that his grantors and predecessors made the prior appropriation; that he and they have acquired a right to the water of said creeks by an adverse user thereof; and that plaintiff seeks to obtain the water for speculative purposes. A reply having put in issue the allegations of new matter contained in the answer, the cause was referred to J. L. Rand, Esq., to take testimony and report the same, with his findings of fact and law thereon; and the referee, having found that defendant and his predecessors had acquired a right by adverse user of all the waters of Straw Ranch Creek, that plaintiff was the prior appropriator of the waters of Alder Creek to the extent of sixty-five inches under a six-inch pressure, and that defendant was entitled to the next fifty inches, measured under like pressure, recommended a decree according to said findings. The

Statement of the case.

court, however, modified the report of the referee, and found that the defendant and his predecessors made the prior appropriation of garden; that Huffman transferred said ranch to Valentine Gray, who took possession of it, and cultivated the gardens by irrigation, but, being unable to make payment of the purchase price, restored the premises to his said grantor; that a stage company built a house and barn on said Straw Ranch, where it kept its stock and a way station, but having discontinued the station at that place, the buildings were, in eighteen hundred and sixty-six, sold by one George Atkinson to the plaintiff, who moved them to his own land; that Robert Kitchen was the next occupant of Straw Ranch, but from whom he obtained the right of possession, or when he established his residence thereon, are disputed facts of the case. Kitchen, in eighteen hundred and seventy-nine, transferred his interest in the premises to S. A. Heilner, from whom the defendant, by mesne conveyances and transfers, acquired possession on May tenth, eighteen hundred and eighty-four. It also appears that defendant made a homestead filing upon the north half of the southeast quarter, the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section thirty-three in said township and range, and on July seventh, eighteen hundred and ninety-one, he obtained the United States patent for said land; that when defendant took possession, the cultivated portion of Straw Ranch consisted of a garden containing about two acres, and, in addition to the old ditches, two others had been dug, one from Straw Ranch Creek, and the other from Kitchen Creek, tributaries of Alder Creek; that Kitchen and his successors in interest prior to defendant had appropriated about six inches of water to irrigate said garden, and the excess flowing in the ditches was returned to Alder Creek, and appropriated by the plaintiff; that the

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defendant and his predecessors have for more than ten years used the waters of Straw Ranch Creek, which furnishes about five inches or one fifth of the natural flow of the waters of said Alder Creek, at no time to exceed twenty inches, decreed a perpetual injunction against the diversion of more than that quantity, and awarded plaintiff his disbursements for clerk's and sheriff's fees, and, with this exception, decreed that each party pay his own costs, from which the defendant appeals.

MODIFIED.

Messrs. Olmstead & Courtney, for Appellant.

Messrs. Williams & Smith, for Respondent.

Opinion by MR. JUSTICE MOORE.

The defendant contends that Robert Kitchen obtained possession of Straw Ranch in eighteen hundred and sixty-six, from Huffman, after Gray's relinquishment, and occupied the premises from that time until eighteen hundred and seventy-nine; that the absence of record evidence of transfers of the premises showing the chain of title is due to the loss of two volumes of the county records; and that he has by other evidence joined his possession to that of Herman, the original settler; and that plaintiff acquired no interest in Straw Ranch by the purchase of the buildings from the stage company; while the plaintiff contends that by his purchase he secured possession of the premises; that he abandoned the same together with the ditches and right of appropriation of water thereby; and that Straw Ranch remained unoccupied from eighteen hundred and sixty-six to eighteen hundred and seventy-one, when Kitchen took possession of it as vacant public land. The law is well settled in this state that improvements made upon the public lands

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of the United States can be transferred by a voluntary surrender of the possession of such lands, and that the transferee without a conveyance, becomes vested with all the right his predecessor had in the premises: *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13. While there is an irreconcilable conflict in the evidence, we think the trial court correctly found that Kitchen succeeded to the rights of Huffman in Straw Ranch, and that the defendant's possession is joined to that of Herman, the original settler; but we are not prepared to say that the appropriation was prior to that made by the plaintiff. A ditch had been dug from the creek, and the water diverted and appropriated to irrigate plaintiff's claim prior to his settlement thereon in eighteen hundred and sixty-six; but it does not appear from the evidence when this ditch was completed, and hence it is impossible to say who has the prior right. Assuming that defendant has it, he would be entitled to divert and appropriate a sufficient quantity of water to irrigate his land if his grantors and predecessors in interest prosecuted the cultivation of it with due and reasonable diligence: *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13; *Simmons v. Winters*, 21 Or. 35, 27 Pac. 7; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568. The evidence conclusively shows that from the time the water was first diverted until the defendant secured possession in eighteen hundred and eighty-four, a period of twenty years, only about two acres of land had been reduced to cultivation, from which it would appear that Robert Kitchen had no intention of farming Straw Ranch. What constitutes a reasonable time within which the waters of a stream should be appropriated to some beneficial use, in order to establish a right thereto, is a question of fact dependent upon all the circumstances of the case. The evidence shows that while Kitchen or his son cultivated the small garden each year and that the former

claimed to be in the legal possession of the premises from eighteen hundred and sixty-six to eighteen hundred and seventy-nine, he spent the most of his time in another neighborhood mining, and during thirteen years not a single acre was added to the area of cultivated land. We think Kitchen during that time should have enlarged the cultivated tract, and, failing to do so, he abandoned the right to increase the appropriation. The present right, therefore, to appropriate water for the irrigation of Straw Ranch must be confined to the quantity necessary to properly irrigate the garden maintained by him.

2. The defendant's right cannot be enlarged because water in excess of the appropriation has been flowing through the ditches upon Straw Ranch, and returned to the creek to be appropriated by the plaintiff. The right of appropriation does not depend upon the size or capacity of the irrigating ditch, but upon the application of the water to the intended use (*Fort Morgan Land and Canal Co. v. South Platte Ditch Co.* 18 Col. 1, 30 Pac. 1032); and since the application, prior to defendant's possession, was confined to the irrigation of the garden, his right can be no greater than that possessed by his grantors and predecessors in interest, where subsequent rights have attached. To constitute a valid appropriation of water, three elements must always exist: First, an intent to apply it to some beneficial use, existing at the time or contemplated in the future; second, a diversion from the natural channel by means of a ditch, canal, or other structure; and, third, an application of it, within a reasonable time, to some useful industry: Black's Pomeroy on Water Rights, §§ 48-51. There having been a failure to make the application of the water to the irrigation of the land within a reasonable time, one of the elements of a valid appropriation is lacking, and hence the defendant's claim to a

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prior appropriation in excess of the quantity necessary to irrigate the garden must fail. The plaintiff has constantly for more than twenty-five years diverted and appropriated the water of said Alder Creek after it flowed through the ditches on Straw Ranch; and if he were not a prior appropriator he has in the mean time acquired the right to use a sufficient quantity to irrigate his cultivated land, subject, however, to the defendant's right to appropriate sufficient to irrigate the garden maintained by Kitchen. And if the appropriation of the water to irrigate defendant's garden was not prior to that of plaintiff's, then by a continuous use of it for more than ten years under a claim of right by the defendant and his grantors and predecessors in interest, a right has been acquired to continue such use to that extent, and also to the appropriation of the waters from Straw Ranch Creek.

The record shows that the plaintiff, on September twenty-fourth, eighteen hundred and eighty-four, granted to the Oregon Railway & Navigation Company, and to its successors and assigns, the perpetual right to take water for all legitimate purposes from such place on Alder Creek as said company or its agents might select, and that, in pursuance of such grant, said company laid a pipe to a point on said creek about four or five miles above plaintiff's point of diversion, and diverted about two inches of water to a tank erected on its line of railway and used to supply its engines. From this grant the defendant infers that plaintiff seeks to enforce his claim to use of the water of said creek for speculative purposes. The railroad company is not a party to this suit, and hence any conclusion upon the validity of the grant to it would be mere dictum. So far as the rights of the plaintiff and defendant are concerned, the grant would amount to a change of plaintiff's point of diversion; but, since the record shows that there is sufficient water in the

Points decided.

channel of the creek at the point of defendant's diversion to supply his appropriation, he cannot be injured by it. The defendant testified that Kitchen had never appropriated more than six inches of water to the irrigation of the said garden, and hence we conclude that quantity sufficient for such purpose, and is the measure of defendant's right which he may alternately divert from Alder Creek under a six-inch pressure at the head of either the old or new ditch in addition to the waters of Straw Ranch Creek.

3. Inasmuch as the appropriation of the waters of a stream when applied to a beneficial use has the effect of appropriating the tributaries also (*Low v. Schaffer*, 24 Or. 239, 33 Pac. 678), the plaintiff is entitled to the uninterrupted flow into Alder Creek of the waters of Kitchen Creek and said spring, so that he may have the use of one hundred and fifty inches of water from said Alder Creek, less two inches granted to railroad company, measured at the points of diversion under a six-inch pressure, if there be that quantity remaining after supplying the defendant's appropriation. The decree of the court below will therefore be modified and one entered here in accordance with this opinion.

MODIFIED.

[Decided June 28, 1894.]

McBROOM v. THOMPSON.

1. **WATERS—PAROL LICENSE—REVOCATION.**—A parol license to divert a certain quantity of water for irrigating purposes is not revocable by the licensor after the licensee has expended his money and labor in digging a ditch and preparing his land for the use of the water upon the faith of such parol license; and a grantee of the riparian owner having notice of such license takes subject to it. *Curtis v. La Grande Water Co.* 20 Or. 34, approved and followed.

2. **ESTOPPEL—IRRIGATION—PERMITTING IMPROVEMENTS TO BE MADE WITHOUT OBJECTION.**—Where, for a series of years, riparian owners and their

25	559
27	354
25	559
34	21
25	559
35	281
25	559
36	86
25	559
37	13
37	237
37	586
25	559
44	200

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grantors have acquiesced in the diversion of a part of a stream by a person who is not a riparian owner, and such person has yearly aided in keeping the channel of the stream open, and expended money on his farm, which would be worthless without the water, a court of equity will not enjoin a further diversion of the water at the suit of such riparian owners.*

APPEAL from Umatilla: MORTON D. CLIFFORD, Judge.

This is a suit by P. G. McBroom to enjoin the defendants from diverting the waters of a branch of the Walla Walla River, in Umatilla County, Oregon. The evidence shows that on December thirteenth, eighteen hundred and eighty-two, Henry Nichols obtained a patent from the United States for the southwest quarter of section twenty-six, in township six north of range thirty-five east of the Willamette Meridian, and on June eighteenth, eighteen hundred and eighty-three, he and his wife conveyed a tract of fifteen and one half acres from the northwest corner thereof to R. B. Crego, who, on October tenth, eighteen hundred and eighty-seven, conveyed it to the plaintiff; that the Walla Walla River flows in a northerly direction to a point near the town of Milton, where it divides into two branches, the eastern being known as the Tum-a-Lum, and the western as the Little Walla Walla, which flows through plaintiff's land, situated about two miles below the fork. The defendant Thompson, being the owner of land above plaintiff's through which the Little Walla Walla flows, on February twenty-eighth, eighteen hundred and eighty-four, granted to his codefendants the right to divert the water of said stream and conduct it in a ditch across his premises, to be used in irrigating theirs. The defendants, having obtained Crego's consent thereto, dug a ditch about two and a half

* NOTE.—An interesting collection of authorities touching the subject of estoppel by conduct will be found in a note to the Arizona case of *Dalton v. Rentaria*, 15 Pac. 37.—REPORTER.

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miles in length, from a point on the Little Walla Walla River just below the said fork, and have since eighteen hundred and eighty-four diverted and appropriated water to irrigate their lands, no part of which is returned to said stream. The Tum-a-Lum has a greater fall and swifter current than the Little Walla Walla, and the winter freshets fill up the head of the latter stream with rock, gravel, and other material, seriously obstructing the flow of the Walla Walla into it, and causing the greater quantity of water to flow into the Tum-a-Lum; and the persons owning lands on the banks of the Little Walla Walla River, together with the defendants, whose lands are irrigated by water from said ditch, have, by common consent and understanding, each year removed by their own labor the obstructions from the channel of the Little Walla Walla River, and built dams in the Tum-a-Lum, by which about one half of the volume of water has been made to flow in each stream, for which service the defendants were to have the privilege of withdrawing water to irrigate their lands. The plaintiff, prior to his purchase of the land from Crego, saw the said ditch, and knew that the defendants were diverting water from the stream running through the tract he intended to purchase; he aided the defendants and others in removing such obstructions, and placing the dams aforesaid, with knowledge of said understanding, and of the fact that the defendants were laboring and expending their means in improving and cultivating their lands which would be valueless without irrigation, and never made any objection to the use of said water by them till this suit was commenced. The plaintiff alleges in his complaint that he is a riparian proprietor on the Little Walla Walla River, and entitled to the flow of said stream in its natural channel; that the defendants are not riparian proprietors on said stream, and have no

Argument of counsel.

right to divert the waters thereof, which he needs for irrigation and domestic purposes. The defendants, after denying the material allegations of the complaint, allege the foregoing facts as an equitable estoppel. After the issues were completed the cause was referred to R. M. Turner to take testimony, which having been done, the court at the hearing thereof decreed a perpetual injunction against the diversion and use of the water of said stream, and awarded plaintiff his costs and disbursements, from which decree the defendants appeal.

REVERSED.

Messrs. Cox, Catton, Teal & Minor, for Appellants.

The right to the use of water may be acquired by exclusive and uninterrupted enjoyment in a particular way for a period corresponding with the time fixed by the statute as a bar to an entry on lands: *Black's Pomeroy on Water Rights*, § 133; *Tolman v. Casey*, 15 Or. 83; *Huston v. Bybee*, 17 Or. 140; *Orandall v. Woods*, 8 Cal. 136; *Union Water Co. v. Orary*, 25 Cal. 504, 85 Am. Dec. 145.

The use enjoyed here had all the essentials to create a prescriptive right. There was nothing to detract from it except some verbal objections, which were insufficient to suspend the running of the statute: *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. Law, 605; *Cox v. Clough*, 70 Cal. 345; *Kimball v. Ladd*, 42 Vt. 747.

A change in the point of diversion works no break in the running of the statute: *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Junkans v. Bergin*, 67 Cal. 267; *Fuller v. Swan River P. M. Co.* 12 Col. 12.

An agreement between parties who settle upon lands in the vicinity of a stream of water capable of being utilized for irrigation, as to the appropriation of the water for such purpose, which agreement had been acted upon for a long time by the parties, and its violation by any

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of them would produce irreparable damage to others, will be enforced in a court of equity: *Coffman v. Robbins*, 8 Or. 278; *Combs v. Slayton*, 19 Or. 99; *Dalton v. Rentaria*, (Ariz.), 15 Pac. Rep. 37; *Churchill v. Bauman*, 95 Cal. 541.

The respondent is estopped by the facts of this case from denying the appellants' right to the diversion of the water taken by them: *Gould on Waters* (1st Ed.), § 530; *Combs v. Slayton*, 19 Or. 99; *Curtis v. La Grande Water Co.* 20 Or. 34, 10 L. R. A. 484; *Churchill v. Bauman*, 95 Cal. 541; *Slocum v. C. B. & Q. R. R. Co.* 57 Iowa, 675; *Niven v. Belknap*, 2 Johns. 573; *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310; *Hodgson v. Jeffries*, 52 Ind. 334; *Ogle v. Dill*, 55 Ind. 130.

The respondent is bound by everything that would have bound his grantors: *Coffman v. Robbins*, 8 Or. 278; *Curtis v. La Grande Water Co.* 20 Or. 34, 15 L. R. A. 484; *Carlisle v. Stephenson*, 8 Md. Ch. 499.

Messrs. Leasure & Stillman, for Respondent.

The fact is established by the evidence of all parties that a large amount of water is diverted from the Walla Walla River by the Powell Ditch, which is never returned to the stream, and that this ditch, leaving the river about two miles above the premises of McBroom, was dug and is owned and controlled by all the defendants. No pretense is made by the defendants that they are not absolutely appropriating and diverting the water carried in the ditch to their own use. They do not merely claim the use of the water, sending it down to the riparian owners below, after enjoying the usufruct, but the water diverted, after it has passed their premises, and after they have used it, is permitted to go where it wills, no pains whatever being taken to return it to the natural and ancient channels of the Walla Walla River so that riparian owners below might enjoy even the use of the

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surplus. This is directly in violation of the right of McBroom, a riparian owner—whose lands lie on both sides of the Walla Walla River—below to the unrestricted and undiminished flow of the water onto and across his premises in the natural and ancient channels. Although McBroom has merely the usufruct of that water as it passes along, the right to the usufruct of the undiminished flow of the river is an undoubted right that attaches to the land: *Weiss v. Oregon Iron Co.* 13 Or. 497; *Angel on Water Courses*, §§ 90, 94; *Gould on Waters*, § 204; *Washburn on Easements*, § 319; *Oregon Iron Co. v. Trulinger*, 3 Or. 1. The right to even the usufruct is limited to riparian owners or proprietors, while in this case it is worthy of note that none of the defendants, except Thompson, are riparian proprietors on the Walla Walla River at all, or upon any of its ancient channels.

After title to the premises had passed from the United States to plaintiff's grantors, no one could thereafter appropriate the water flowing across his land at the time he obtained title: *Leigh v. Independent Ditch Co.* 8 Cal. 323; *Orandall v. Woods*, 8 Cal. 136. It is fully in evidence in this case that McBroom was, and is, the owner of the tract of land mentioned and claimed by him in his complaint; that he, and his grantors, have reduced part of it to cultivation, and that two or more natural channels of the Walla Walla River flow through it from which he drew water for irrigation and domestic purposes. It is also in evidence that there is no very large amount of water flowing through these streams at the best, and by the testimony of the defendants themselves, especially of the defendant Powell, that the Powell Ditch was about three feet wide at the top, and an average depth of eight inches, and that it carried about that quantity of water away from the Walla Walla River.

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It is fully established by the testimony of all the witnesses for the plaintiff, that by reason of the waters diverted from the Walla Walla River by means of the Powell Ditch, McBroom, during the irrigation seasons of eighteen hundred and ninety-two and eighteen hundred and ninety-one and eighteen hundred and ninety, had not sufficient water to irrigate his fruit, berries, or vegetables, and at one time not even enough to water his horses. In that respect, direct and positive injury is shown to have been sustained by McBroom. The testimony of all the witnesses shows that it is the intention of defendants to continue the operation of the Powell Ditch. Certainly neither as riparian owners nor prior appropriators have they any right which would warrant them in working such a hardship upon McBroom, and depriving him of his riparian rights.

If there had been an agreement between plaintiff, or his grantors, and the defendants, and then plaintiff and defendants had coöperated in digging ditches for the purpose of carrying water upon their respective parcels of land, the court might be justified in dividing the water. But where there is no such agreement or coöperation, the courts will not deprive a riparian owner of his property: *Combs v. Slayton*, 19 Or. 99; *Luz v. Haggin*, 69 Cal. 255; *Rissein v. Brown*, 10 S. W. Rep. 661.

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The defendants contend that the ditch was constructed under a parol license from R. B. Crego, plaintiff's grantor, and that after its construction the license became irrevocable. The defendant, W. S. Powell, testified that after securing the deed from the defendant Thompson, the construction of the ditch was commenced with Crego's consent, but that Henry Nichols then owned the tract of land now owned by the plaintiff. In this the witness is

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in error, as the record evidence conclusively shows that Crego had obtained his deed from Nichols more than eight months prior to the date of Thompson's deed; and while Nichols may have objected to the diversion of the water, he then had no right to speak as a riparian proprietor of the premises now owned by the plaintiff. The ditch having been constructed under a parol license from Crego, the question is presented whether such license is revocable after labor and money have been expended in pursuance thereof. "An executed license," says LORD, J., in *Curtis v. La Grande Water Co.* 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484, "is treated like a parol agreement in equity; it will not allow the statute to be used as a cover for fraud; it will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given or had the effect to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel." In *Coffman v. Robbins*, 8 Or. 278, it was held that a parol agreement to divide the waters of a stream that had been acted upon by the parties for several years, under which ditches had been dug and possession given, would be enforced in equity. So, too, in *Combs v. Slayton*, 19 Or. 99, 26 Pac. 66, it was held that where the riparian proprietor had not claimed the exclusive right to the water of a stream, but had permitted the defendant to dig a ditch and appropriate a part thereof, that such acts evince a tacit agreement that each should be entitled to appropriate a just proportion of the water for the purpose of irrigation, and that such

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agreement should be carried into effect. While it is claimed that the better rule, in view of the statute of frauds, appears to be that, so far as the question of further enjoyment is concerned, the licensor may revoke the parol license after an outlay under it (Bigelow on Estoppel, 666), the contrary doctrine has, by the foregoing decisions, been firmly established in this state. The reason for the estoppel in such cases rests upon the principle that the licensee, after the expenditure of money and labor on the faith of the parol license, cannot be placed in *statu quo* upon its revocation: 2 Herman on Estoppel, § 982. The defendants having expended their money and labor in digging the ditch upon the faith of Crego's parol license, it follows that he could not revoke it after such expenditure, and the plaintiff, having acquired the title to his premises with notice of the diversion, could obtain no greater interest therein than his grant or possessed, and hence he cannot now revoke the license: *Ourtis v. La Grande Water Co.* 20 Or. 34, 10 L. R. A. 484.

The evidence shows that the defendants have each year since the ditch was constructed, aided the riparian proprietors, including Crego and plaintiff, in removing obstructions from the Little Walla Walla River, and in building dams in the Tum-a-Lum, under a common understanding that in consideration of such aid the defendants were to have the right to divert sufficient water for the irrigation of their lands; that the plaintiff and his grantor have for eight years, with knowledge of the diversion and use of the water, seen and acquiesced in the defendant's improvement of their farms by means thereof, under a reasonable expectation that the diversion and use would be continued, and from these circumstances it is contended that the plaintiff is estopped from discontinuing the diversion and use of the water for irrigation. Such acqui-

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escence, if voluntary and continued for a considerable length of time, constitutes a *quasi* equitable estoppel that does not cut off the party's title nor legal remedy, but bars his right to equitable relief, and leaves him to his legal action alone: 2 Pomeroy's Equity, § 817. The case of *Dalton v. Rentaria* (Ariz.), 15 Pac. 37, illustrates this doctrine. That was a suit to restrain the defendants from preventing the waters of the Santa Cruz River, in Arizona, from flowing in certain acequias from which plaintiffs' land was supplied with water for irrigation. The plaintiffs had contributed their proportion of labor and expense in maintaining all said acequias for irrigating purposes equally with the defendants. The defendants, in their answer, admitted that the greater part of plaintiffs' lands, which were arid, and would raise no crops without irrigation, had been cultivated for sixteen years. The court in passing upon the question said: "These admissions on the record are significant, and evoke a serious reflection. If the greater part of the plaintiffs' land has been cultivated for the last sixteen years, it was done with or without defendants' consent. If without their consent, have they not been guilty of laches, unreasonable delay, and inexcusable neglect in waiting sixteen years without taking any steps to restrain the wrongful acts of plaintiffs? If the defendants were fairly put upon their guard; if they had actual knowledge that plaintiffs were diverting waters that belonged to defendants by virtue of prior appropriation; if they stood by for sixteen years or more, and saw the plaintiffs build their houses, open out their lands, and put them in cultivation, expend their money in the improvement of these homes, pay their proportion of the expenses, and bear their proportion of the labor in building and repairing the acequias, and otherwise do and perform such acts as indicated that plaintiffs believed they had equal rights with defendants to the waters of

Santa Cruz River,—do not all these circumstances serve to imply that defendants waived or abandoned any exclusive prior right to said waters? At least was there not such unreasonable delay as that they are now precluded from complaining? Will parties be permitted to stand by for sixteen years or more and see new fields put in cultivation, irrigated, forsooth, with water to which they have an exclusive prior right, see large sums expended in erecting new homes, and witness new and important interests intervene, and then be heard to complain? *A fortiori*, defendants will not be heard to complain if these things were done with their consent. Indeed, our opinion is, in this case, that acquiescence, nonaction, on the part of the defendants for so long a time gave consent. They could not consent 'till title vested, and then dissent,' so that it is really immaterial whether the irrigation was done with or without defendants' consent, if they stood passively by. See *Smith v. Hamilton*, 20 Mich. 433; *Park v. Kilham*, 8 Cal. 78; *Joyce v. Williams*, 26 Mich. 332."

In *Slocumb v. Railway Co.* 57 Iowa, 675, 11 N. W. 641, the facts showed that a small creek touching a corner of plaintiff's land was crossed by defendant's railroad upon bridges at two places. The defendant filled the bed of the creek at the two crossings, and turned the channel along the side of the railway, so that the bridges were dispensed with, and the creek did not touch plaintiff's premises. The plaintiff stood by and saw the work of diversion progressing, and it was not until after it was fully completed, at a cost of more than five thousand dollars, that any objection was made. It was there held, upon those facts, that the trial court did not err in refusing to grant a mandatory injunction for the restoration of the stream. In the case at bar there has been more than a mere voluntary acquiescence, or standing passively by, while the defendants were digging their ditch

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and improving their lands. The plaintiff and his grantor, for eight years, without any objection whatever, aided the defendants in repairing the damages caused by the winter freshets, with knowledge of their appropriation, and of the common understanding that in consideration of such aid the defendants were to enjoy the right of diverting the water for the irrigation of their lands. The defendants, thus encouraged by the plaintiff's voluntary acquiescence and participation in a common purpose, laid out their money and expended their labor in making homes for their families, under an obvious expectation that no obstacle would afterward be interposed to prevent their enjoyment. The plaintiff's objection, in view of the unreasonable delay, and of all the circumstances of the case, now comes too late, and under the maxim that, "He who is silent when he ought to speak, shall not be heard to speak when he ought to keep silent," he can have no standing in a court of equity to enjoin a diversion and use of the waters of a stream that he and his grantor have tacitly encouraged. It appears from the evidence that the defendants have been diverting about two hundred and forty inches of water from the Little Walla Walla River, without pressure, and that this quantity is necessary for their use, and that fully as much flows in the channel of said stream through plaintiff's land, which, if diverted, would be sufficient for its irrigation. Plaintiff's cause of suit is not based upon a division of the water in proportion to the equitable rights of the parties, but to enjoin the defendants from preventing the water of the stream from flowing through his land in the natural channel, undiminished in quantity; and since it appears that there are other riparian proprietors on said stream who are interested in the diversion, but are not parties to this suit, no decree could settle their respective rights by a division of the water, and hence it would be

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useless to remand the cause for that purpose. The decree will therefore be reversed and the complaint dismissed.

REVERSED.

[Argued February 19; decided June 26, 1894.]

CARMODY v. SCHRAMM.

APPEAL from Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by the appellant, Mary E. Carmody, to set aside four deeds executed by Lucinda Hawkins (now deceased), one deed to John Schramm, a second deed to Charles H. Schramm, a third deed dated July fifth, eighteen hundred and eighty-nine, to Samuel Hawkins, and a fourth deed dated July fifth, eighteen hundred and eighty-nine, to Henry H. Hawkins, each deed conveying about forty acres of agricultural land. The two Schramms are grandsons, and the two Hawkinses are sons of the said Lucinda Hawkins. The grounds alleged in the complaint are that Lucinda Hawkins was old, weak, and infirm in body, and feeble and unsound in mind, and was easily influenced and prejudiced against her best friends. And that the defendants, taking advantage of the weak and feeble condition of her mind and body, did unduly influence her to convey said property to them, and to disinherit her daughter, the plaintiff. At the trial before M. C. George, Esq., the complaint was dismissed as to the Hawkinses and the referee reported in favor of the other two defendants. This report having been confirmed by the court, plaintiff appeals.

AFFIRMED.

Messrs. McGinn, Sears & Simon, for Appellant.

Mr. Edward W. Bingham, for Respondent.

Per Curiam.

PER CURIAM.

The determination of the question involved in this case rests wholly upon matters of fact, an examination of which has satisfied us that the conclusions of the trial court are correct, and that the decree must be affirmed.

AFFIRMED.

[Decided June 28, 1894.]

HARTMAN v. BOLLES.

APPEAL from Umatilla: MORTON D. CLIFFORD, Judge.

Action by J. L. Hartman against J. T. Bolles to recover damages for the conversion by defendant of a stock of hardware. On a trial before a jury there was a verdict for defendant, hence this appeal.

AFFIRMED.

No appearance for Appellant.

Mr. Thos. H. Crawford, for Respondent.

PER CURIAM.

There being no appearance or brief filed in behalf of the appellant in this court, the judgment in this case is affirmed without looking into the record.

AFFIRMED.

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[Argued June 11; decided June 28, 1894.]

WILLIAMS v. ISLAND CITY MILLING CO.*

[S. C. 37 Pac. 49.]

25 573
44 77

1. DAMAGES — BREACH OF CONTRACT — LOSS OF TIME. — The measure of damages for failure to complete the repairs to a mill within the time stipulated in the contract, and for the loss of time occasioned by the contractor's attempts to make the repairs conform to the requirements of the contract, is the reasonable value of the use of the mill during such time as ascertained from past experience, and not the expected profits based on an estimate of the net profit to be derived from the manufacture of a barrel of flour.
2. IDEM. — The measure of damages for the failure of the repairs made upon a mill to conform to the requirements of the contract is the amount which would be required to remedy the defect, and does not include loss of profits for the time that would reasonably have been necessary to remedy the defect, where as a matter of fact the mill was never shut down for such purpose, and the defect never remedied.

APPEAL from Union: JAMES A. FEE, Judge.

This is an action by the firm of Williams & Groat against the Island City Mercantile and Milling Company to recover the sum of two thousand five hundred and

*NOTE.—This is the third appeal in this case, and its history is substantially as follows: In eighteen hundred and eighty-six, O. C. Gove & Co. entered into a contract with the Island City Milling Company to furnish their mill at Island City with the roller process for grinding flour. The work was undertaken, but was not completed in a manner satisfactory to the company, whereupon Gove & Co. brought their action on the contract to recover the unpaid part of the stipulated price, and recovered a judgment, but on appeal the case was sent back for a new trial: *Gove v. Island City Milling Co.* 16 Or. 93. On the entry of the mandate Gove & Co. dismissed their original complaint, and commenced a new action in the nature of assumpsit for goods sold and services performed, to which the milling company answered by setting up the written contract and the breach thereof. Judgment went for the milling company, but was reversed: *Gove v. Island City Milling Co.* 19 Or. 363. Thereafter Gove died and the case was continued by Williams & Groat as the survivors of the partnership of Gove & Co. In this case the milling company again had a judgment, which is now reversed and the cause remanded for a fourth trial.—REPORTER.

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seventy-two dollars and thirty-five cents, an alleged balance due on account for materials, machinery, and appliances furnished, and work and labor performed, by the plaintiffs for the defendant. The complaint alleges that between the first day of May, eighteen hundred and eighty-six, and the first day of January, eighteen hundred and eighty-seven, the plaintiffs, at the special instance and request of defendant, and for its use and benefit, furnished a large amount of material and machinery for the rebuilding, construction, and repair of a certain flouring-mill of the defendant, and between said dates performed a large amount of work and labor for the defendant in the rebuilding, construction, and repair of said mill and its attachments; that the material and machinery so furnished and labor performed were and are of the reasonable worth and value of eight thousand one hundred and thirty-four dollars and twenty-five cents, that the sum of five thousand six hundred and thirty-one dollars and ten cents has been paid thereon and no more, and prays judgment for the balance of two thousand five hundred and three dollars and fifteen cents, with interest thereon from January first, eighteen hundred and eighty-seven.

The answer denies the allegations of the complaint, and alleges, in substance, that on June fifth, eighteen hundred and eighty-six, the plaintiffs and defendant entered into a contract in writing, by the terms of which plaintiffs were to furnish the material, machinery, and appliances, and perform the work and labor necessary in reconstructing and remodeling the defendant's flouring-mill as in the complaint mentioned, and in changing the machinery so as to manufacture flour by the "roller" process, for which they were to be paid the sum of eight thousand one hundred and thirty-four dollars and twenty-five cents at certain specified times, and that five thou-

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sand six hundred and thirty-one dollars and ten cents, has been paid thereon; that the work was to be fully completed by the tenth day of September, eighteen hundred and eighty-six, and the plaintiffs guaranteed that the mill, when completed according to their contract, would have a capacity of sixty barrels of flour in twenty-four hours, and make as much and as good flour from a bushel of wheat as any other mill in Eastern Oregon, when grinding the same kind of wheat; that in pursuance of said contract the plaintiffs undertook to refit said mill as therein provided, but have failed and neglected to comply with their contract in this; that said mill was not finished and turned over to said defendant at the time agreed on, nor until ten days thereafter, to wit, on the twentieth day of September, eighteen hundred and eighty-six, and that when completed it did not have a capacity of sixty barrels of flour in twenty-four hours, or any greater capacity than forty-five barrels, and would and could not make as much flour from a bushel of wheat "as any mill in Eastern Oregon, when grinding the same kind of wheat"; that by reason of the delay in the completion of the work it is damaged in the sum of four hundred and five dollars; that after the mill was turned over to the defendant it failed to do the work guaranteed by the contract, and the plaintiffs made divers attempts between September twentieth and December twentieth to make it comply with the contract, and in so doing required it to be shut down from time to time, aggregating in all about ten days, during which time the use of the mill was lost to the defendant, to its damage in the sum of four hundred and fifty dollars; that by the difference in the actual capacity of the mill as turned over, and the guaranteed output, it was further damaged in the sum of eight thousand four hundred and eighty-two dollars and fifty cents, and for the failure to make as much flour

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from a bushel of wheat as other mills in Eastern Oregon when grinding the same kind of wheat, it claims four thousand two hundred and forty-one dollars and twenty-five cents as damages; that on the twentieth day of September, eighteen hundred and eighty-six, the contract was voluntarily abandoned by plaintiffs, and defendant thereupon took possession of the mill, and operated the same to the best advantage until the tenth day of February, eighteen hundred and eighty-nine, when it employed other persons to repair said mill, which necessitated a suspension of operations for the period of ninety days, during which time it wholly lost the use of the mill, to its damage in the sum of four thousand and fifty dollars. The defendant therefore claims to recoup in this action the damages sustained by it in the loss of the use of the mill from the tenth of September, when the contract should have been completed, to the twentieth of the same month, when it took possession; for the loss of its use during the ten days when it was shut down after the twentieth of September, at plaintiff's request, while they were attempting to comply with their contract; for the loss occasioned by the difference between the actual and the guaranteed capacity of the mill, and in the amount of wheat necessary to make a barrel of flour in excess of that required by other mills in Eastern Oregon when grinding the same kind of wheat; and also the loss of the use of the mill during the time it would have been necessary to shut it down in order to enable the defendant to make the repairs and additions necessary to bring it up to the required capacity.

The record contains numerous assignments of error, based upon the rulings of the court in the admission of testimony and the giving and refusal of instructions, but as they all present the same question they need not be set out in detail. The question thus presented is the

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right of the defendant to recover as the measure of damages for the breach of the contract, the anticipated or expected profits which it might have realized from the operation of its mill, had the contract been complied with. The evidence tended to show that at the time the contract was made, defendant's mill had been in operation for several years, and had a capacity of seventy-five barrels of flour in twenty-four hours; that defendant had an established business, and a ready sale for all the flour it could manufacture, at an average profit of seventy-five cents per barrel; that at the time the contract was to have been completed, it was ready to operate the mill, and had on hand, or within easy reach, sufficient wheat for the purpose; that its trade extended throughout Eastern Oregon and Idaho, its sales being usually made on sixty days' time; that the profits of the business depended, to some extent, upon the solvency and promptness of its customers; that plaintiffs' representative and agent, through whom the contract was made, went through the mill, and saw the business it was doing before the contract was entered into. The evidence further tends to show that there was no established rental value of the mill, which could be made the measure of damages for the loss sustained while it was idle. Plaintiffs claimed to have completed their contract on or about the twentieth of September, eighteen hundred eighty-six, at which time the defendant took possession of the mill, but soon discovered that its work fell short of the guaranty, in that its actual capacity was only about forty-five barrels of flour in twenty-four hours, and it required more wheat to make a barrel of flour than required by other mills in Eastern Oregon, whereupon the plaintiffs, from that time until some time in December following, endeavored to comply with their contract, by making further improvements and repairs, but, failing in the effort, wholly

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abandoned the performance of their contract on or about the twentieth of that month; that the defendant then took possession, and continued to operate the mill until some time in February, eighteen hundred and eighty-nine, when a new contract was entered into with other parties, to reconstruct it so as to enlarge its capacity to seventy-five barrels in twenty-four hours; and that, in order to make these repairs, it was necessary to shut the mill down for about three months.

Upon this testimony the court charged the jury that if plaintiffs constructed the mill mainly according to their contract, and furnished the material, and performed the work and labor, in good faith, with intent to comply therewith, and did not wilfully abandon the performance of the contract, they were entitled to recover from the defendant the reasonable value of such work, material, and machinery, not exceeding the contract price, less all payments made thereon, and what it would cost to remedy the defects in the mill, and make it as designed by the contracting parties, together with such further damages as the defendant may have sustained by the failure of the plaintiffs to comply with the terms of their agreement; that after plaintiffs had ceased all efforts to comply with the contract, it was the duty of defendant to have, within a reasonable time, not extending beyond February first, eighteen hundred and eighty-seven, made the changes and improvements necessary to put the mill in the condition contemplated by plaintiff's guaranty, and to have charged the plaintiffs with the expense thereof, together with the value of the loss of the use of the mill for the time necessary to make such changes and improvements, and not to have continued to operate it at a loss; that it could not recover damages for any loss sustained in the operation of the mill, caused by defective construction, after the time the same might have been repaired

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by the defendant, but that it was entitled to recover the value of the use of the mill for the ten days from September tenth to the twentieth; for the time after that date aggregating ten days during which it was so stopped at the instance of plaintiffs; and for such reasonable length of time after their abandonment of the contract as would have enabled the defendant to make the changes necessary to bring the mill up to the desired standard. And further, that it was also entitled to damages on account of the loss occasioned by the difference between its actual and guaranteed capacity during the time plaintiffs were so endeavoring to remedy the defects therein, and for a reasonable time thereafter, not extending beyond February first, eighteen hundred and eighty-seven, and also for the loss suffered during the same time because the mill required a greater quantity of wheat to make a barrel of flour than other mills in Eastern Oregon, while grinding the same wheat; that while the measure of damages for the total stoppage of the mill during the time for which they were allowed would be primarily its rental value, if the jury found there was a rental value, but if there was no evidence of such rental value as could be relied upon with any reasonable degree of certainty, then they might allow the defendant as damages the amount of net profits which would have been realized by it, if they could determine from the evidence with reasonable satisfaction and certainty what profits would have resulted to the defendant from the operation of the mill during the time it was so suspended. And by the term "net profits" the jury were given to understand is meant the difference between the selling price of a product and the cost of its production and sale. And the measure of damages for the loss occasioned by the difference between the actual and guaranteed capacity of the mill, and by the excess of wheat required to make a barrel of flour

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over that stipulated in the contract, was also the loss of profits occasioned thereby.

By direction of the court, the jury made special findings, from which it appears that they allowed plaintiffs one thousand three hundred and forty-two dollars and six cents as the value of the material furnished and work performed by them over and above the admitted payments, and seven hundred and thirty-nine dollars and thirteen cents, as interest thereon, and allowed the defendant as damages for the loss of the use of the mill from September tenth to September twentieth, two hundred dollars; for the loss of the use of the mill while stopped for repairs by plaintiffs after September twentieth, two hundred dollars and twenty-five cents; for the difference between the actual and the guaranteed capacity of the mill, seven hundred and twenty dollars; for the excess in the amount of wheat required to produce a barrel of flour, in comparison with the Union Mill, one hundred and eight dollars; and for the loss of the use of the mill during the time it would have been necessary to have shut it down in order to perform the work necessary to make it comply with plaintiffs' contract, one thousand two hundred and twenty-five dollars; and for a general verdict in favor of defendants for three hundred and sixty-two dollars and six cents.

REVERSED.

Messrs. Johnson & Idleman and Thos. H. Crawford, for Appellants.

It will be seen by referring to the pleadings of the respondent in this case, that it claims a breach of the contract in the following instances: First, that the mill was not completed within the time specified in the contract; second, that the mill, when completed, did not have the capacity of sixty barrels of flour per day, as called for by

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the contract; third, that the mill as completed would not make as much flour per bushel of wheat as any other mill in Eastern Oregon when grinding the same kind of wheat. For each of these alleged breaches of contract the respondent seeks to recoup the damages sustained by it from the value of the material and work furnished and performed by appellant under the contract. It will be seen by the answer of the jury to the fifth interrogatory submitted to them that the jury allowed the respondent the nominal sum of one hundred and eight dollars as damages for the loss sustained by the alleged breach of contract in the ability of the mill as completed to make as much flour per bushel of wheat as any mill in Eastern Oregon when grinding the same kind of wheat. This finding and allowance is not questioned by us; it is based upon the actual loss sustained by the respondent in the excess of wheat that it took at its mill to make a barrel of flour over that required at the Union Mill when grinding the same kind of wheat, from December twentieth, eighteen hundred and eighty-six, to February twentieth, eighteen hundred and eighty-seven. Here the number of barrels of flour ground, the excess of wheat over that required at the Union Mill, and the price of wheat were given. In this instance the loss sustained by respondent was a mere mathematical calculation. Having found the number of barrels of flour ground, the excess of wheat required to make a barrel of flour and the cost of wheat per bushel, the loss sustained by respondent was definite and certain. It was not left to conjecture or speculation; it was peculiarly within the province of a jury to say how many barrels of flour were ground, how much more wheat it took to make a barrel of flour than it took at the Union Mill, and how much this wheat cost respondent per barrel. These facts being found by the jury the result was a mathematical demonstration.

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As to the damages sustained by the respondent for the breach of the contract in this particular, the jury being confined by the court to the facts and the damages actually and certainly sustained, and denied the right of entering the field of speculation and uncertainty, the result was a reasonable finding and allowance that commends itself to all parties in interest here. On the other two claims for damages, the jury was not confined by the court to facts showing the loss actually sustained of the gains actually prevented; on the contrary, they were directed to enter the field of speculation as to the gains that might have been prevented, the profits that might have been made in the milling business, wherein the price of wheat, material, and labor, the supply, demand, price, and market for flour, the solvency of purchasers and the changes of the season as affecting the water power of respondent's mill, all contributed to the uncertainty as to the profitableness or unprofitableness of the business. The result is simply what might be expected; a verdict that is simply an outrage upon the appellant, that is out of all proportion to the damages actually sustained, or the loss of profits prevented. Here the respondent was allowed two thousand three hundred and forty-five dollars' damages for the loss of profits on less than one fourth the capacity of the mill as called for by the contract for a period of about four and one half months, and that, too, when for part of this time the water was so low that the mill could not be operated at all, and a good portion of the balance of the time only on half time. This was the loss of profits on less than one quarter of the capacity of the mill as contracted for, and amounted to at least five hundred dollars per month. Does any sane man for one moment believe that the respondent or any one else in the state of Oregon, in eighteen hundred and eighty-six and eighteen hundred and eighty-seven, could, by any

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possible means, make a net profit by the operation of a sixty-barrel mill of two thousand dollars per month, or twenty-four thousand dollars per year? And yet this is just what the jury say in these special findings the respondent would have made but for the default of the appellants. These special findings are the legitimate fruits of the court's direction of the jury to enter the field of conjecture and speculation as to the gains or profits that might have been made in the enterprise as a basis of assessing damages for the breach of contract. We admit the gains prevented, as well as the losses sustained, by the breach of contract may be recovered as damages; but, in order that gains in the way of profits may be recovered as damages for a breach of contract, they must be not only such as directly and certainly flow from the breach, but such as were either directly contracted for, or such as may be said to be fairly within the contemplation of the parties at the time the contract was entered into, and they must be the proximate and certain results of the breach, and not remote, contingent, or speculative.

The liability for a breach of contract is less extensive than that for tort, involving only such consequences as were the direct result of the breach, and were within the contemplation of the parties at the time of the formation of the contract. The damages recoverable upon the breach of a contract are only those damages which are the direct and proximate result of the wrong complained of. Damages which are remote and speculative cannot be recovered: 1 Suth. on Dam. 74; Wood's Mayne on Dam. § 14; *Burton v. Pinkerton*, L. R. 2 Exch. 340; *Walruth v. Whittekind*, 26 Kan. 482; *Prosser v. Jones*, 41 Iowa, 674; *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Osborne v. Poket*, 33 Minn. 10; *Willingham v. Hooven*, 74 Ga. 233, 58 Am. Rep. 435; *Allis v. McLean*, 48 Mich. 428; *Frazee v. Smith*, 60 Ill. 145; *McKinnon v. McEwan*, 44 Iowa, 159.

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The losses on collateral engagements dependent on the fulfilment of the principal contract are too remote to be considered in estimating the damages for the breach of the principal contract: *Lawrence v. Wardwell*, 6 Bab. (N. Y.), 433; *Harper v. Miller*, 27 Ind. 277; *Clare v. Maynard*, 6 Ad. and Ell. 519; *Walker v. Moore*, 10 B. and C. 416; *Cuddy v. Major*, 12 Mich. 368; *Barnard v. Poor*, 21 Pick. (Mass.), 378; *Fox v. Harding*, 7 Cush. (Mass.), 516; *Griffin v. Colver*, 16 N. Y. 489, 59 Am. Dec. 718.

Profits, which are the direct immediate fruits of the contract, are recoverable; but not mere speculative profits which are entirely conjectural. The profits here sought to be recovered as damages by the defendant for the breach of this contract, are simply such gains as the defendant might have made but for the breach of the contract. They were entirely conjectural, dependent on collateral engagements and sales of the mill's product, with respect to which no means existed of even approximately ascertaining the results, and as such they are not within the range of recoverable damages: 1 Sutherland on Damages, 141; *Ferris v. Comstock*, 33 Conn. 513; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Dec. 425; *Bergen v. New Orleans*, 35 La. Ann. 523; *Jones v. Nathrop*, 7 Col. 1; *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Pennypacker v. Jones*, 106 Pa. St. 237; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458; *Anderson v. Sloan*, 72 Wis. 566; *C. F. Manf. Co. v. Rogers*, 19 Ga. 416; *Water Lot Co. v. Leonard*, 3 Ga. 560; *Vicher v. T. B. R. Co.* 34 Ga. 536.

Messrs. Cox, Cotton, Teal & Minor and R. Eakin, for Respondents.

The trial court properly directed the jury in regard to the damage sustained by respondent in the reconstruc-

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tion of its mill. There was evidence tending to prove that the mill was not up to the contract at the time Gove & Co. ceased to work on it; that its condition continued substantially the same until respondent had it reconstructed in eighteen hundred and eighty-nine; that at the time it was stopped for such repairs respondent was in position to use it, and actually lost the benefit of its operations; that the profit upon the product was the same as at the time when the work done by Gove & Co. was completed, and that the cost of labor and machinery was substantially the same. It is true that respondent enlarged its mill beyond the capacity stipulated for in the Gove contract, but that point was carefully guarded by the court, and the question as to the necessity for this reconstruction was also left to the jury. The instructions given in this behalf were too clearly right to admit of any question. The question as to the right to recover loss of profit is the most important of those involved in the case. The claim is of a two-fold character,—first, for a total loss during the time the mill was idle; and, secondly, for a partial loss arising from the amount of wheat wasted and the lack of capacity of the mill in the production of flour. As to the last claims it would seem that they could be reached in no other way than by a consideration of the earnings of the mill. For loss sustained by a total stoppage the rule laid down in many cases is that the rental value of the mill constitutes the measure of damage. This is unjust, as it leaves out of account the personal services of the mill owner and the good will of the business which may have been established by him and which would not go to a tenant, and if it were necessary we would challenge the soundness of the rule in this case. The question is, what damage has been sustained by the mill owner to his business at the time and in the manner it was conducted when the

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grievance occurred? We are happily relieved from this discussion, however, by the fact shown in evidence that there was no rental value for such property in the section where it was located.

In presenting the counterclaims growing out of the partial loss of profits we pleaded the facts as they existed, showing that the mill had been run for something over two years. It was anticipated, and the jury were so instructed at respondent's request, that this time would be reduced to a reasonable limit, and the court fixed an ultimate limit at February first, eighteen hundred and eighty-seven, giving respondent thirty days after Gove had ceased his repairs upon the mill to arrange for its reconstruction by other parties. With these preliminary statements and this qualification, it will appear that the charge given the jury on this subject was eminently proper. It was shown by the evidence that at and prior to the time this contract was entered into, Gove went over the mill and was fully advised as to the character and amount of business done by respondent, so that the damages claimed must have been within his contemplation at the time; the existence of a supply of wheat on hand or within reach, its cost, the cost of labor, the selling price of the product, and in short all of the elements which entered into the determination of the matter of profits were fully shown, and the jury had the benefit of the respondent's extensive experience as their guide. In the light of all these considerations there is certainly nothing unreasonable in regard to the verdict returned, either as to its amount or as to the steps taken by the jury in arriving at it. The general measure of damages in cases of this character is what it would have cost respondent to make its mill as good as appellants had agreed to make it, which is but another way of saying that the measure of relief is the difference in value between the thing as de-

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livered and as contracted to be delivered. This principle is so well established as to require no citation of authority, but for a case much in point upon several of the questions involved in this controversy. See *Eureka Co. v. Windsor Co.* 51 Vt. 170.

The respondent was entitled to recover for loss of profits it sustained by appellants' failure to comply with their contract: *Hinkley v. Reckwith*, 13 Wis. 31; *Clifford v. Richardson*, 18 Vt. 620; *Walker v. France*, 112 Penn. St. 203; *Holden v. Lake Co.* 53 N. H. 552; *White v. Mosley*, 8 Pick. 356; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315; *Willer v. O. R. & N. Co.* 15 Or. 153; *Drake v. Sears*, 8 Or. 209; *Shepard v. Gas Co.* 15 Wis. 349, 82 Am. Dec. 679; *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858; *Treat v. Hiles*, 81 Wis. 280, 60 Am. Rep. 585; *Brigham v. Carlisle*, 78 Ala. 243; *Leonard v. Beaudry*, 68 Mich. 312; *Allison v. Chandler*, 11 Mich. 542; *Wakeman v. W. & W. M. Co.* 101 N. Y. 205, 54 Am. Rep. 676; *Beeman v. Banta*, 118 N. Y. 538, 16 Am. St. Rep. 779; *Brown v. Hadley*, 43 Kan. 267; *Crawford v. Parsons*, 63 N. H. 438; *Taylor v. Dustin*, 43 N. H. 493.

Of the cases above cited the first six relate directly to mills, and all of them suggest useful analogies from the application of circumstances under which loss of profits may be recovered to various commercial ventures. There is a distinction between loss of profits to an established business and to one only prospective: 1 Sedgwick on Damages (8th Ed.), § 182.

Opinion by MR. JUSTICE BEAN.

1. One of the most vexed and difficult questions of the law is to determine when the right exists to recover expected or anticipated profits in an action for a breach

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of a contract, and we shall not attempt to enter upon any extended discussion of the question at this time, but shall rather content ourselves with indicating the conclusions to which we have arrived in the case, after due and careful consideration, materially aided as we have been by the exhaustive and comprehensive briefs, as well as the able and learned argument, of counsel on either side. The object of damages is, primarily, compensation to an injured party for a loss sustained, and the rule is, primarily, that only such damages can be recovered as are the natural and proximate result of a breach, and that damages which are purely speculative or conjectural are not recoverable. But the application of this rule varies as much as the facts of the adjudged cases in which it has been applied. There is nothing in the term "profits" which of itself excludes their being given in evidence, and used as the measure of damages; and when excluded it is because they are either unnatural or remote, or there are no criteria by which to estimate them with that certainty which the law requires. Indeed, in many cases, profits are the only certain or reliable measure of damages; but as a general rule the expected or anticipated profits of a business enterprise cannot be proven with any degree of certainty, and therefore cannot be recovered. They can only be computed or ascertained by guess or speculation, because they depend on so many contingencies, such as competition in business, supply and demand, the condition of the money market, availability of labor, and like uncertain conditions. There may be future profits in any business, or there may be losses, "hence, in such cases, the measure of damages is," says Mr. Sedgwick, "not expected profits, but the average value of the use of the business; and to ascertain this, evidence of actual past profits must be admissible": 1 Sedgwick on Damages, § 174. There is in the books a

well-grounded distinction between the interruption of an established business, and the prevention of the establishment of a new business. In the latter case the rule of damages is necessarily kept within prescribed limits, because there is nothing by which the anticipated value of the proposed business can be proven. But, as said by Mr. Sedgwick, "when it clearly appears that the defendant has interrupted an established business, from which plaintiff expected to realize profits, the plaintiff should recover compensation for whatever profits he makes it reasonably certain he would have received": *Id.* § 182. But such loss of profits is not to be estimated by expected or anticipated specific profits, because the earning of such profits is but conjectural, and depends upon too many contingencies, but should be based upon the value of the use of the business to the plaintiff, as ascertained and determined from actual past experience: 1 Sedgwick on Damages, §§ 174, 189; 1 Sutherland on Damages, § 70; *Geobel v. Hough*, 26 Minn. 252, 2 N. W. 847; *Crawford v. Parsons*, 63 N. H. 438; *White v. Moseley*, 8 Pick. 356; *Simmons v. Brown*, 5 R. I. 299; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914; *Allison v. Chandler*, 11 Mich. 542; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 13; *City of Cincinnati v. Evans*, 5 Ohio St. 594.

And this, we think, is the proper measure of damages in this case. The defendant had been operating its mill for several years before the breach of plaintiff's contract, and it can show what its average profits had actually been, and so ascertain with reasonable certainty what the value of the use of the mill would have been to it during the time it was prevented from operating it on account of plaintiff's breach of the contract, the effect of the change from the "burr" to the "roller" process, as contracted for, being of course taken into account. For this purpose,

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proof of past profits, if any, were admissible in evidence. While it is true the evidence showed, or tended to show, that the mill had no rental value, within the sense that a business house in a populous city has a rental value, yet its actual value to the defendant could have been ascertained with reasonable certainty by reference to the business which it had previously done. Under the rule adopted by the trial court, however, the damages were to be determined on an estimate of the future profits the defendant might have realized from a sale of the mill products, had the mill been operated to its full guaranteed capacity, basing the same upon a net profit of seventy-five cents per barrel of flour, without regard to what the past experience of the defendant had shown the actual value of the use of the property to be, and was, we think, therefore, too speculative and uncertain to form a basis for estimating damages, when other and more certain data were at hand: 1 Suth. on Dam. § 60; *Pennypacker v. Jones*, 106 Pa. St. 237; *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640; *Anderson v. Sloane*, 72 Wis. 566, 40 N. W. 214; *Brigham v. Carlisle*, 72 Ala. 243; *Frazer v. Smith*, 60 Ill. 145; *The C. F. Mfg. Co. v. Rogers*, 19 Ga. 417; *Water Lot Co. v. Leonard*, 30 Ga. 560; *Jones v. Nathrop*, 7 Col. 1, 1 Pac. 435; *Shank v. Shoemaker*, 18 N. Y. 489. We are aware the authorities are not uniform on this question, but it seems to us the rule we have indicated is more likely to do justice between the parties to this record than the one adopted by the trial court. The anticipated or expected profits from the operation of a flouring-mill are proverbially uncertain and contingent, and to allow them, as such, to be recovered as damages in an action for a breach of contract to furnish machinery and appliances for such mill, is to allow the jury to enter into the realm of speculation and uncertainty. As said by Mr. Justice COOLEY, in *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640, a case

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similar to the one at bar: "Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is therefore very properly held, in cases like the present, that the party complaining of a breach of contract must point out elements of damage more certain, and more directly traceable to the injury, than prospective profits can be." [Citing *Fleming v. Beck*, 48 Pa. St. 309; *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365; *Straun v. Cogswell*, 28 Ill. 457; *Frazer v. Smith*, 60 Ill. 145; *Howe Machine Co. v. Bryson*, 44 Iowa, 159. We are of the opinion, therefore, that the true measure of damages for the failure to complete the contract within the time stipulated, and for the loss of time occasioned by the attempts of the plaintiffs, after September twentieth, to comply with the terms of their contract, is the reasonable value of the use of the mill during such time, as ascertained from the past experience of the defendant.

For the time it would have been necessary to have shut the mill down after plaintiffs abandoned their contract, in order to make the repairs and additions necessary to bring it up to plaintiffs' contract, we think the defendant is not entitled to recover damages, for the very good and sufficient reason that the mill was never so shut down, and such repairs or additions were never made, and consequently there was no loss on that account. It is true, some two or three years afterwards, defendant awarded a contract to some other parties to remodel and reconstruct the mill, but not for the purpose of making it conform to the terms of plaintiffs' contract. For the loss of time in making such repairs plaintiffs are clearly not liable. The defendant was given, on the trial, the benefit of what it would have cost to remedy the defect in the mill, and

Points decided.

make it what it should be under the contract, but it cannot recover damages for the loss of the use of the mill during the time necessary to make such repairs, when no such time was lost or damage sustained. The ruling announced by the court as to the measure of damages for the difference between the actual and guaranteed capacity of the mill was, we think, correct, because it was based upon the past transaction, and it is a mere matter of mathematical calculation to determine the difference between the actual output of a forty-five-barrel capacity mill and what the output would have been during the same time had the mill been up to the guaranteed capacity; but it seems to us such loss should have been confined to the time plaintiffs' were engaged in endeavoring to comply with their contract, and not extended to a reasonable time thereafter in which to enable defendant to secure the services of some person to complete plaintiffs' contract, for the reason suggested, that no such time was lost or repairs made. It follows that the judgment of the court below must be reversed and this cause remanded for a new trial.

REVERSED.

[Decided June 23, 1894.]

BOWEN v. CLARKE.*

[S. C. 37 Pac. 74.]

PRINCIPAL AND SURETY—ORIGINAL UNDERTAKING.—Where two or more persons execute an instrument at the same time, upon the same consideration, and for the same purpose, they are all, in legal effect, joint contractors, so far as concerns their liability to the other contracting party, although one may be designated therein as "surety," and sign as such. That one of the parties may have executed the instrument

* NOTE.—This case was before the supreme court in 1892, on plaintiff's appeal, and was reversed: *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 265, with note, 30 Pac. 430.—REPORTER.

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as surety is only evidence of the position and relationship of the makers among themselves, and does not affect the joint nature of their obligation or the right to sue them jointly for a breach of the contract.

APPEAL from Baker: MORTON D. CLIFFORD, Judge.

This is an action brought by J. P. Bowen against John G. Clarke, John A. Basche, and P. Basche, jointly, to recover a certain amount claimed to be due for rent under the following written lease:—

“This indenture, made this tenth day of June, A. D., one thousand eight hundred and ninety, by and between John P. Bowen of Baker City, Oregon, and John G. Clarke, and John A. Basche, and P. Basche, as surety, all of Baker City, Oregon,—Witnesseth: that in consideration of the covenants herein contained on the part of the party of the second part to be kept and performed by them, the said party of the first part do hereby let, lease, and demise unto the said Clarke and Basche, party of the second part, the following described premises situate, lying, and being in Baker City, Baker County, Oregon, to wit: All of and the entire building situate on Front Street, together with the fixtures and shelving. To have and to hold the same to the said lessees for the term of three years ending June first, eighteen hundred and ninety-three, from the first day of June, eighteen hundred and ninety. * * * And said lessees, for their executors and administrators, do hereby covenant to and with the said lessor, his heirs and assigns, to pay the said rent in monthly payments of one hundred dollars each, the first payment thereof to be made on the tenth day of June, eighteen hundred and ninety, and on the first day of each month thereafter. * * * In testimony whereof, the said parties have set their hands and seals on the day and year first above written to this

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and to another instrument of the same tenor and date.

“JOHN P. BOWEN, [L. s.]

“JOHN G. CLARKE, [L. s.]

“JOHN A. BASCHE, [L. s.]

“P. BASCHE, [L. s.]

“Surety.”

The complaint alleges, in substance, that on the first day of June, eighteen hundred and ninety, plaintiff rented to the defendants, and the defendants hired of plaintiff, the premises described in the lease for the time, and upon the terms, therein stated; that the defendants immediately went into possession, and that they have failed and neglected to pay the stipulated rent, or any part thereof, since April thirty, eighteen hundred and ninety-one, except the sum of two hundred and forty dollars. The defendant P. Basche alone answered, denying all the allegations of the complaint, and, for a further defense, *inter alia*, alleged that in June, eighteen hundred and ninety-one, the lease was canceled, and the premises surrendered to plaintiff by mutual consent of the parties. The reply put in issue the affirmative allegations of the answer, and upon the issues thus made a trial was had, resulting in a verdict and judgment in favor of the plaintiff, from which the defendant Basche appeals.

AFFIRMED.

Messrs. T. Calvin Hyde, Thos. H. Crawford, and F. L. Moore, for Appellant.

Mr. William Smith, for Respondent.

Opinion by MR. JUSTICE BEAN.

The errors assigned arise upon the admission of testimony, and instructions given and refused by the trial court. The principal question presented is whether the

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defendant P. Basche can be sued jointly with the other defendants, the solution of which depends upon whether his undertaking is original or collateral. If his contract is collateral, and one of guaranty only, his liability and that of his principals is several, and cannot be enforced by a joint action: *Tyler v. Trustees of Tualatin Academy*, 14 Or. 485; but if he is a joint contractor with the other defendants, the action is properly brought. We understand the rule to be that where two or more persons execute an instrument at the same time, upon the same consideration, and for the same purpose, they are all, in legal effect, joint contractors or obligors, so far as their liability to the other contracting party is concerned, although one may be designated therein as surety, and sign it as such. That one of the parties may have executed the instrument as surety, is mere evidence of the position and relationship of the makers among themselves, and does not affect the joint nature of their obligation or the right to sue them jointly for a breach of the contract. "The undertaking of a surety who signs upon the face, or at the end, of a contract, with the principal, although he adds the word surety to his name," says JOHNSON, J., "is an original, and not a collateral, undertaking. It is not a promise to answer for the debt, default, or miscarriage of another, but is an undertaking for a direct performance on his own part. He becomes a party to the contract, and may be treated as principal by the creditor, although he is a surety merely, as between him and the other party with whom he jointly or severally undertakes. In such cases no writing, other than the body of a contract, is necessary; and the statute of frauds has no application. The debt is his if the contract is valid": *Perkins v. Goodman*, 21 Barb. 218. And, as was remarked by Mr. Justice REED in *Stag v. Olds*, 12 Ohio, 168, "The principle to be

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extracted from all the cases is that parties connected with the original execution and delivery of a bond, note, or other written instrument, are, in law, unless it be otherwise clearly expressed, joint makers or obligors." When the undertaking of the surety is not for a direct performance by himself, but only that his principal shall perform, and that he will be bound in case of default, his undertaking is not original, but collateral, and therefore his liability depends upon the terms of his contract, and not upon the character in which he may execute it. Now in this case the lease was executed by all the parties, at the same time, upon the same consideration, and for the same purpose, and the undertaking of the appellant is not made conditional or dependent upon the default of the other defendants, but is an original, unconditional undertaking for a direct performance on his part. It is plain, therefore, within the rule stated, that his contract is not one of guaranty, or an agreement to answer for the debt, default, or miscarriage of another, but that of a joint obligation as to the plaintiff, and, as a consequence, may be declared upon as such: Baylies on Sureties and Guarantors, 393; Brandt on Suretyship, § 31; *Lightner v. Menzel*, 35 Cal. 452; *Thomas v. Gumaer*, 7 Wend. 44; *Preston v. Huntington*, 67 Mich. 139, 34 N. W. 279; *Leonard v. Sweetzer*, 16 Ohio, 1; *McLott v. Savery*, 11 Iowa, 323; *Watson v. Beabout*, 18 Ind. 281; *Scott v. Swain*, 8 Atl. 24; *Giltinan v. Strong*, 64 Pa. St. 242; *Rose v. Madden*, 1 Kan. 445.

Nor is it a matter of any importance that he did not actually occupy the premises. By his contract he binds himself jointly with his codefendants to pay the rent when due, and, if not so paid, he became at once liable, whether he occupied the premises or not: *Preston v. Huntington*, 67 Mich. 139, 34 N. W. 279. This is not an action for use and occupation, but for breach of a contract en-

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tered into by the defendants jointly. There was, therefore, no variance between the allegations of the complaint and the terms of the lease, and no error in instructing the jury that the defendant P. Basche was a joint contractor or obligor with the other defendants, and liable with them for the payment of the rent as it became due. The other assignments of error, relating to instructions given and refused by the trial court, are without merit. The court adhered substantially to the principles announced in *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430, and hence committed no error. Judgment affirmed. **AFFIRMED.**

[Decided June 23, 1894.]

MANAUDAS v. MANN.

[8. C. 37 Pac. 55.]

APPEAL from Baker: MORTON D. CLIFFORD, Judge.

This is a suit by Joseph Manaudas to have the defendant Mann declared a trustee of the south twenty feet of lot number two, block number two, in Fisher's Addition to Baker City, to compel him to convey the same to plaintiff and to account for the rents and profits. The facts are, that on December thirty-first, eighteen hundred and seventy-seven, Mann, being the owner of said lot number two, sold, and by bond for a deed agreed to convey, the same to the plaintiff upon the payment of three hundred dollars, the balance of the purchase price, within three months from the date of the bond; that thereafter, and on the twenty-sixth of March, eighteen hundred and seventy-eight, the plaintiff, being largely indebted to the defendant Heilner and one Cohn, conveyed to them, as security for said indebtedness, and for the balance due

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Mann, which they agreed to assume, a large amount of property, and directed the defendant Mann to convey to them the lot so bonded, which was accordingly done by a deed absolute in form, but which was understood and agreed between plaintiff and Heilner & Cohn to be a mortgage. On December nineteenth, eighteen hundred and seventy-nine, and before the time for redemption had expired, Heilner & Cohn sold and conveyed to Mann the property in dispute in this suit for the sum of six hundred and seventy-five dollars, ever since which time Mann has been in the possession of the same, and receiving the rents and profits thereof. The plaintiff being unable to arrive at a satisfactory settlement of his affairs with Heilner & Cohn, commenced a suit against them on the twelfth of September, eighteen hundred and eighty-one, for an accounting, and to compel them to reconvey to him all the property which had theretofore been conveyed to them as security for his indebtedness, and thereafter such proceedings were had that on June eleventh, eighteen hundred and eighty-five, a final decree was entered in said suit, in which it was adjudged and decreed that all said indebtedness to Heilner & Cohn had been fully paid, and it was further decreed that Heilner & Cohn should reconvey to plaintiff all of lot two in block two upon the payment to them of the sum of six hundred and seventy-five dollars, the amount received by them from Mann: *Manaudas v. Heilner*, 12 Or. 335, 7 Pac. 347.

As soon as the decree of the court was filed in the court below, the plaintiff, in compliance therewith, paid to Heilner & Cohn the sum of six hundred and seventy-five dollars, and received from them the deed to lot two, and immediately demanded possession from Mann, which being refused, he began an action to recover such possession. This action was pending in the courts for some

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considerable time, but was finally dismissed upon plaintiff's motion, and this suit commenced against Mann and Heilner (Cohn having in the mean time died) to compel a conveyance of the property in dispute. A demurrer to the complaint being sustained in the court below, the decree was reversed in this court, and the cause remanded with permission to the defendants to apply for leave to answer, on condition that they deposit with the clerk the sum of six hundred and seventy-five dollars, and interest from the time it was paid to Heilner & Cohn by the plaintiff in pursuance of the decree made in June, eighteen hundred and eighty-five: *Manaudas v. Mann*, 22 Or. 525, 30 Pac. 422. The defendants having complied with the order of the court, and made the necessary deposit, were permitted to answer, and denied some of the allegations of the complaint, and the defendant Mann for a further defense averred that the purchase by him from Heilner & Cohn was made in good faith, supposing them to be the owners of the property, and without knowledge of plaintiff's claim thereto, or that it was held only as security, and further, that the sale was made by the consent and direction of the plaintiff. The defendant Heilner admitted that he received from plaintiff the sum of six hundred and seventy-five dollars in pursuance of the decree of this court, but averred that he did not convey or intend to convey to him the property in question, and also that Mann purchased the same in good faith. The cause being at issue was referred to W. F. Butcher, Esq., to report the facts and the law. After hearing the testimony, the referee found that the sale to Mann by Heilner & Cohn was made with the knowledge and by the direction of the plaintiff; that Mann was a purchaser in good faith and for value, and recommended that the complaint be dismissed as to him, but that plaintiff have a decree against Heilner for the six hun-

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dred and seventy-five dollars paid to Heilner & Cohn on November fourteenth, eighteen hundred and eighty-five, with interest, and that the money on deposit be applied on said decree. The court below affirmed the report as to Mann, and decreed accordingly, but set it aside as to Heilner; dismissed the complaint and directed the clerk to pay the money on deposit to Heilner, and from this decree the plaintiff appeals. **REVERSED.**

Messrs. Rand & Shinn and John M. Gearin, for Appellant.

Messrs. Thos. H. Crawford, Frank L. Moore, and T. Calvin Hyde, for Respondents.

Opinion by Mr. JUSTICE BEAN.

There are but two questions presented by this record, and they are: (1) Was the sale by Heilner & Cohn to Mann made by the direction and consent of the plaintiff; and (2) if not, was Mann a *bona fide* purchaser for value without notice? Both these are pure questions of fact, and while the findings of the referee and court below are in favor of the defendants, we have reached the conclusion, after a careful examination, that such findings are not sustained by the testimony. The defense that the sale was authorized by the plaintiff is made in this case for the first time, although this controversy in one form or another has been in the courts for more than ten years, and the circumstances by which the witnesses fixed the time when the alleged consent was given show clearly that it was long after the sale had been made. Hence, in view of these circumstances, and the fact that plaintiff unqualifiedly denied in his testimony that he ever authorized or was consulted about the sale, or knew anything about it until long afterwards, we are impelled to

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the conclusion that it was made without his authority or consent. The defendants claim, and so testify, that Mann purchased the property in good faith, without any knowledge of the character in which Heilner & Cohn held it, or plaintiff's claim thereto; but in this they are contradicted, not only by the entire circumstances of the case, but by the positive testimony of disinterested witnesses, who testified unqualifiedly that Mann was informed of the condition of the title, and of plaintiff's rights, and advised not to buy; that he said he did not care anything about plaintiff, as Heilner was good to him for any money he might pay for the property. Without recapitulating the testimony, it is sufficient to say that in our opinion, from the overwhelming weight of the evidence, the defendant Mann took the deed from Heilner & Cohn with knowledge of the facts and circumstances under which they held the premises, and therefore took the title as a trustee for the plaintiff, and cannot claim the protection due to a *bona fide* purchaser. He stands in the shoes of Heilner & Cohn, and the plaintiff having established his right to the property as against them by the decree of this court (12 Or. 335, 7 Pac. 347), it necessarily follows that he must prevail in this suit.

The decree of the court below is therefore reversed, and a decree will be entered here that the defendant, Mann, within sixty days after the entry of the decree of this court in the court below, execute and deliver to the plaintiff a good and sufficient deed to the property in controversy free from all liens or incumbrances placed thereon, or suffered to be placed thereon, by him, and in case of a failure so to do the decree shall stand for such conveyance, and that plaintiff have judgment against him for the rental value of the said premises from November fourteenth, eighteen hundred and eighty-five, at fifteen dollars per month, amounting in the aggregate to the sum of one

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thousand five hundred and fifty-five dollars and fifty cents, and against both defendants for his costs and disbursements in this suit.

REVERSED.

[Argued April 4; decided April 10, 1893.]

WHEELER v. CRAGIN.

1. **SERVICE OF NOTICE OF APPEAL.**—The notice of appeal required by section 537 of Hill's Code should be served on the attorney of the respondent, if such attorney reside in the county where the case is pending: Code, § 531.
2. **SERVICE OF NOTICE OF APPEAL BY ATTORNEY.**—The notice of appeal required by section 537 of Hill's Code may be served by the appellant's attorney under the terms of Hill's Code, § 527.

APPEAL from Marion.

In perfecting the appeal herein the notice of appeal was served by the attorney for appellant by leaving a copy at the office of respondent's attorney in Marion County as provided by subdivision 1 of section 527, Hill's Code. Respondent now moves to dismiss the appeal because the notice of appeal was not served on the respondents personally, and because said notice was not served by a sheriff, by a deputy sheriff, or by a person specially appointed by the sheriff, or by a person specially appointed by the judge of the court where the action was pending: Code, § 54.

Wm. M. Kaiser, for the motion.

This court has practically decided this motion in the case of *Williams v. Schmidt*, 14 Or. 470. But the statute, section 527, provides that the "proof of service shall be the same as proof of service of a summons," and the only persons who can serve a summons are those designated

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in section 54. An attorney is not one of the persons so designated, and it seems to necessarily follow that the notice in this case has never been legally served.

Robert G. Morrow, contra.

1. The question here raised has been entirely settled by the case of *Butler v. Smith*, 20 Or. 129, to the effect that the notice of appeal may be served on either the respondent or his attorney, when either resides in the county where the action is pending. It is true that section 537 provides that the notice shall "be served on the adverse party," but this must be considered in connection with section 531, which requires all papers to be served on the attorney of record in the cause.

2. To the second ground of the motion it may be answered that the classes who may serve a notice of appeal are designated in section 527, viz., "by any person other than the party himself." Whoever serves the notice must make proof of his act in one of the two ways laid down in section 61, but the persons who may make the proof are designated by section 527, and not, as respondent contends, by section 54. The service was made by some person other than a party, (viz., his attorney,) and the proof was properly made by affidavit, as required by section 61.

PER CURIAM.

The service of the notice of appeal having been made on respondent's attorneys residing in the county where the cause was pending, is sufficient.

We are further of opinion that a notice of appeal may be served by appellant's attorney.

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2. *IDEM*.—State legislatures may create liens on vessels for supplies or demands, as has been done by section 3690 of Hill's Code, and may also provide for their enforcement by proceedings *in rem*; but whenever the liens so created arise out of maritime contracts, the parties must seek their remedy in the federal courts to which exclusive jurisdiction in admiralty and maritime case has been confided by the constitution of the United States, article III., § 2. State legislatures have power to create maritime liens, but not to provide for their enforcement.—*The Willapa*, 71.

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NOTICE OF APPEAL—BILL OF EXCEPTIONS—CODE, §537.—Much greater care is necessary in specifying errors in a notice of appeal where there is a bill of exceptions than where the appeal rests entirely upon the record, since the respondent is presumed to take notice of matters of record, but would not be chargeable with knowledge of a decision upon matters not in writing.—*Bridal Vell Lumber Co. v. Johnson*, 105.

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1. **BREACH OF PROMISE—SEDUCTION AS AN ELEMENT OF DAMAGES—CODE, § 36.**—In actions for breach of promise, seduction under the promise may be shown in aggravation of damages, notwithstanding section 36, Hill's Code, which gives to an unmarried woman over twenty-one years of age a right of action for her own seduction.—*Osmun v. Winters*, 260.
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1. **CONTRACT—BROKER—EQUITY.**—Under a contract by a real estate broker for the sale of lands, providing that when the owner has received a designated amount in actual cash from the sale of the property, if realized during the existence of the contract, he will convey to the broker all the unsold lots and all the notes wholly or partly unpaid, the broker may recover from the owner an amount advanced to prevent a forfeiture of the contract after the latter

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 Powell v. Dayton Railroad Co. 16 Or. 38, cited, 119, 126.
 Putman v. Southern Pacific Co. 21 Or. 244, approved and followed, 205.
 Rankin v. Malarkey, 23 Or. 593, approved and followed, 49.
 Remillard v. Prescott, 8 Or. 37, approved and followed, 109.
 Rosenblatt v. Perkins, 18 Or. 162, cited, 483.
 Rugb v. Ottenheimer, 6 Or. 231, approved and followed, 109.
 Sabin v. Columbia Fuel Co. 25 Or. 15, approved and followed, 305.
 Sheppard v. Yocum, 10 Or. 413, approved and followed, 290.
 Simmons v. Winters, 21 Or. 35, cited, 556.
 Smith v. Foster, 5 Or. 44, cited, 332.
 Smith v. Kelly, 24 Or. 464, cited, 505.
 State v. Bruce, 5 Or. 68, cited and approved, 84.
 State v. Doty, 5 Or. 93, cited and approved, 84.
 State v. Glass, 5 Or. 73, cited, 257.
 State v. Murray, 11 Or. 413, cited, 395.
 State v. Roberts, 15 Or. 196, cited, 257.
 State v. Shaw, 22 Or. 287, cited and approved, 123.
 Strode v. Washer, 17 Or. 57, cited, 109.
 Tribou v. Strowbridge, 7 Or. 156, approved and followed, 120.
 Tyler v. Trustees of Tualatin Academy, 14 Or. 435, cited, 205.
 Vandusen v. Shively, 22 Or. 64, cited, 537.
 Watts v. Foster, 12 Or. 247, approved and followed, 119.
 Willis v. Oregon Railway & Navigation Co. 11 Or. 262, cited, 295.

CHANGE OF POSSESSION OF MORGAGED CHATTELS. See CHATTEL MORTGAGES, 1-5.

CHARACTER of Witness as regards truth and veracity cannot be shown affirmatively unless such reputation has been attacked.—*Oman v. Winters*, 290.

CHARTER OF PORTLAND.

Charter of 1882, sections 106, 107, 126.

CHATTEL MORTGAGES. See also MORTGAGES, 1, 2, 3, 4.

1. CHATTEL MORTGAGES—CHANGE OF POSSESSION.—A mortgage of a stock of goods was filed as soon as made, and the mortgagees' agents, who occupied the other side of the same building as the mortgagor, took possession, and put in charge a man who hired the mortgagor to help him, as clerk. New books were opened, and all moneys received, after payment of running expenses, were applied on the mortgage debt. The mortgagor's name on the window was not erased. *Held*, that there was a change of possession, as against subsequently attaching creditors.—*Ex Fisher's Estate*, 64.

CHattel MORTGAGES—CONTINUED.

2. **CHattel MORTGAGES—DESCRIPTION.**—The return of the mortgagor's assignee, to whom the stock of mortgaged goods was turned over by consent, showing that he sold more articles of some kinds than were described in the mortgage, does not show that the description in the mortgage was inadequate as against subsequently attached creditors, there being no averment or proof that the mortgagor had any goods other than those described in the mortgage.—*Re Fisher's Estate*, 64.
3. **FRAUDULENT CONVEYANCE—PARTICIPATION OF MORTGAGOR.**—The fact that a mortgagor may have intended to delay other creditors by giving a chattel mortgage will not affect the validity of the instrument unless the mortgagee so participated in the fraudulent intent.—*Sabin v. Columbia Fuel Co.* 15.
4. **FUTURE ADVANCES.**—A person or corporation, may, in the prosecution of its business, give chattel mortgages to secure not only present advances but future loans.—*Sabin v. Columbia Fuel Co.* 15.
5. **CHattel MORTGAGE—PRESUMPTION OF FRAUD—CHANGE OF POSSESSION—CODE, § 776, SUBDIVISION 40.**—The change of possession of mortgaged chattels necessary to rebut the presumption of fraud raised by subdivision 40 of section 776 of Hill's Code, when the mortgage has not been filed or recorded, must be actual as distinguished from constructive or legal, and it must be accompanied by such outward acts of ownership as will indicate to the public that the property has changed hands. The possession of the mortgagee should also be exclusive, and not jointly or concurrently with that of the mortgagor.—*Pierce v. Kelly*, 96.
6. **CHattel MORTGAGE—EVIDENCE OF FRAUD.**—Where an employé of a person operating a store takes a mortgage on the goods, which is not recorded, the fact that he thereafter purchases other goods without disclosing the fact that he claimed possession of the goods in the store under his mortgage, does not necessarily raise a presumption of fraud if he paid for them; but, if the purchase is made through a prior employé of the mortgagor, without notice to the seller of the change in his employment, it tends to show that there was no such change in the possession of the goods in the store.—*Pierce v. Kelly*, 96.
7. **CHattel MORTGAGE—NOTICE TO CREDITORS OF MORTGAGOR—HARMLESS ERROR.**—An instruction that a chattel mortgage is not good as against creditors who have no notice of its existence, unless placed on file, is erroneous under the Oregon statute as it existed prior to the legislative session of eighteen hundred and ninety-three, but it is harmless where the record shows that the creditor had notice of the execution of the mortgage, and the jury are expressly instructed that a mortgage is good as to such a creditor although not filed.—*Pierce v. Kelly*, 96.
8. **PRIORITIES BETWEEN CHattel MORTGAGES.**—Where chattel mortgages are made in good faith and for a valuable consideration, and possession is not delivered, their priority is determined by the time of their execution, and not by the time of their filing, since by subdivision 40 of section 776, Hill's Code, there is only a rebuttable presumption of fraud against an unrecorded mortgage, which does not exist when the mortgage is either admitted or proven to be *bona fide*.—*Davis v. Bowman*, 189.
9. **FRAUDULENT CONVEYANCES.—PARTICIPATION OF GRANTEE IN THE FRAUD—CODE, § 3058.**—Chattel mortgages given to secure *bona fide* debts are not void on the ground that they are given to hinder and delay creditors, although executed by the debtor for that purpose, where the grantee accepts them simply for the purpose of securing his claim, without any connivance with the debtor, although he may be aware that they will necessarily hinder and delay creditors, and that the debtor executed them with that object in view. It is only when the mortgage is both given and received with the intent to hinder and defraud creditors that it is void.—*Currie v. Bowman*, 365.

CHattel Mortgages—CONCLUDED.

10. CHATTEL MORTGAGES ON STOCKS OF GOODS.—Chattel mortgages on goods constituting stock are valid although permitting the mortgagor to remain in possession where they require him to keep a strict account and pay over the proceeds less the expenses of the business, to the mortgagee, and the conduct of the mortgagee indicates that he intends the terms of the mortgages shall be observed.—*Currie v. Bowman*, 365.

CONFESSIONS.

Evidence to Corroborate Confessions. See CRIMINAL EVIDENCE, 4.

CONSTITUTIONAL LAW.

1. ADMIRALTY—CONSTITUTIONAL LAW—JURISDICTION OF STATE COURTS TO ENFORCE MARITIME LIENS.—CODE, § 3690.—State courts have no jurisdiction to enforce by proceedings *in rem* liens for supplies furnished to a vessel in her home port, since such contracts are maritime, and the district courts of the United States have exclusive jurisdiction thereof under the Revised Statutes of the United States, § 563, clause 8, and § 711, clause 3, which are a reenactment of the ninth section of the Judiciary Act of 1789.—*The Willapa*, 71.
2. *IDEM*.—State legislatures may create liens on vessels for supplies or demands, as has been done by section 3690 of Hill's Code, and may also provide for their enforcement by proceedings *in rem*; but whenever the liens so created arise out of maritime contracts, the parties must seek their remedy in the federal courts, to which exclusive jurisdiction in admiralty and maritime case has been confided by the constitution of the United States, article III, § 2. State legislatures have power to create maritime liens, but not to provide for their enforcement.—*The Willapa*, 71.
3. EQUITY—JURY TRIAL—CONSTITUTION, ARTICLE I, § 17.—A court of equity which has gained jurisdiction of a suit to restrain a private nuisance may render judgment for damages as an incident to the suit for injunction, notwithstanding section 17 of article I. of the state constitution, providing that "in all civil cases the right of trial by jury shall remain inviolate." These words continued to all suitors the right of trial by jury in all cases where it was secured to them by the laws or practices of the courts at the time of the adoption of the constitution, but were not intended to abridge the equity jurisdiction then existing. As equity had jurisdiction to restrain nuisances prior to the adoption of the constitution, the jurisdiction still continues, and the matter of damages is only an incident.—*Fluschner v. Citizens' Investment Co.* 119.
4. RIPARIAN PROPRIETORS—WHARF RIGHTS UNDER SECTION 4227, HILL'S CODE—CONSTITUTIONAL LAW.—The object of section 4227, Hill's Code, which authorizes the owners of land lying upon navigable streams, and within the limits of incorporated cities to construct wharves thereon, and extend them out to navigable water, being to encourage the building of wharves in aid of navigation and commerce, riparian owners on navigable streams, who, before the passage of the section, had built wharves on such upland, acquired, within the spirit and intent of said section, property in such wharves which cannot be taken for public use without just compensation.—*Levitt v. City of Portland*, 185.
5. CONSTITUTIONAL LAW—TITLE OF ACT—CONSTITUTION, ARTICLE IV, § 20.—The fact that a statute entitled "An act to regulate warehousemen, * * * and to declare the effect of warehouse receipts," and making it a crime to issue warehouse receipts for goods not in store, provides for a penalty for its violation, does not render it obnoxious to the constitutional prohibition against acts embracing subjects not expressed in the title.—*State v. Koshland*, 178.

CONSTITUTIONAL LAW—CONCLUDED.

6. DUE PROCESS OF LAW.—Attempting to enforce an assessment for a local improvement upon property that is not benefited at all is taking property without due process of law.—*Oregon & California Railroad Co. v. City of Portland*, 229.
7. CONSTITUTIONAL LAW—HIGHWAYS—TAKING MATERIAL FROM LAND.—Hill's Code, §§ 4092, 4098, authorizing road supervisors to take material for a road from land in their district, and providing for the assessment of damages thereafter by the county court, is constitutional, as the State Constitution, article I., § 18, provides that prepayment need not be made for property taken by the state for public use.—*Cherry v. Lane County*, 497.
8. CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION—LAWS, 1891, P. 184—CONSTITUTION, ARTICLE IV. § 20.—The fact that the act of eighteen hundred and ninety-one (Session Laws, 1891, p. 184), creating the state board of equalization, etc., prescribes certain duties to be performed by the secretary of state and the several county clerks, after the assessment has been equalized by the state board, which are not embraced in its title, does not render so much of the act as undertakes to prescribe such duties obnoxious to Constitution, article IV., § 20, which requires an act to embrace but one subject, "which subject shall be expressed in the title," since these provisions naturally relate to and are connected with the subject matter of the act, *State v. Shaw*, 22 Or. 287, approved and followed.—*State v. Linn County*, 503.

CONSTRUCTION OF STATUTES. See STATUTORY CONSTRUCTION.

CONTRACTS.

1. VENDOR AND PURCHASER—FORFEITURE OF REAL ESTATE CONTRACT.—Where a contract for the sale of land provides that in case of default in paying any installment of the price therein provided for it shall be optional with the vendor to declare the contract cancelled and the amount paid thereon forfeited, the vendor does not forfeit the vendee's money or cancel the contract by conveying the land to a third person, when this person takes the conveyance and pays the balance due on the bond to the use and benefit of the original vendee—the transaction amounts only to a transfer of the vendor's rights. The result of a transfer by the vendor to a disinterested party after condition broken, is referred to but not decided.—*Gray v. Perry*, 1.
2. JURISDICTION OF EQUITY TO REFORM WRITTEN CONTRACTS.—To justify a court of equity in reforming a written contract, it should clearly appear that there was some relation of trust or confidence between the parties that has been abused, or that there was fraud, or fraud on one side accompanied by mistake on the other, or that the means of knowing the facts were not equally open to both parties.—*Kleinsorge v. Rohse*, 51.
3. CONTRACT—BROKER—EQUITY.—Under a contract by a real estate broker for the sale of lands, providing that when the owner has received a designated amount in actual cash for the sale of the property, if realized during the existence of the contract, he will convey to the broker all the unsold lots and all the notes wholly or partly unpaid, the broker may recover from the owner an amount advanced to prevent a forfeiture of the contract after the latter has received in actual cash the full sum contracted for within the time agreed upon, where a total failure of the title after full performance of the agreement precludes the broker from selecting any property in repayment of the amount advanced.—*Bartholomew v. Aumack*, 78.
4. CONTRACTS—BROKERS.—Under an agreement by a real estate broker to clear certain land, survey and plat it into lots, and advertise and sell it, for a commission of ten dollars upon each lot sold, providing that in case of eviction as the result of a pending action the owner shall pay him a designated sum

CONTRACTS — CONCLUDED.

for clearing the land, after which the contract is to become void, the broker cannot recover the expenses of surveying when the action results in eviction.—*Bartholomew v. Aumack*, 78.

5. **ILLEGAL CONTRACT — PLEADING — PROOF — PUBLIC POLICY.**—It is an established rule of pleading that the illegality of a contract sued on must be pleaded in order to be available as a defense; but if it should appear from the testimony of plaintiff's witnesses that the contract in question is illegal or immoral, the court ought to dismiss the proceeding of its own motion on grounds of public policy, even though no such defense has been pleaded.—*At Deon v. Smith*, 88.
6. **ILLEGALITY OF CONTRACT SHOWN BY CROSS-EXAMINATION.**—Where plaintiff, in an action on contract, discloses on his examination in chief only so much of the transaction as leaves an inference of the contract's legality, it is proper for defendant to bring out on cross-examination the remaining facts and circumstances under which the contract arose, and which show its illegality.—*At Deon v. Smith*, 89.
7. **CONTRACT BY CORPORATION THROUGH ITS OFFICERS — COMMISSIONS.**—Officers of a corporation acting on its behalf occupy a peculiarly confidential and fiduciary position, and must act solely for the best interests of the corporation, without reserving any secret advantage to themselves. A contract reserving a secret benefit to the officers is voidable by the corporation within a reasonable time after discovering the facts, and, having done so, the officers cannot recover any benefit or advantage that may have been promised them.—*Jameson v. Caldwell*, 199.
8. **PRINCIPAL AND AGENT — RATIFICATION OF CONTRACT — COMMISSIONS.**—Where a corporation has rescinded a contract made in its name by its officers because of a secret commission contracted for by such officers for themselves, the fact that the corporation again purchases the same property for the same price, less the secret commission, is not such a ratification of the original contract as to make the seller liable to the officers for their commission.—*Jameson v. Caldwell*, 200.
9. **RATIFICATION OF CONTRACT BY CLAIMING DAMAGES.**—Where an agent whose unauthorized contract of purchase has been repudiated by his principal sues the seller for the secret commission promised him, the seller does not by setting up a counterclaim for damages ratify the contract so as to make him liable for the commissions.—*Jameson v. Caldwell*, 200.
10. **PUBLIC IMPROVEMENTS — ALTERATION OF CONTRACT.**—A committee of a city council, when entering into a contract for the construction of a public improvement with the successful bidder before the council, has no authority to insert in such contract items or terms not in the accepted bid; and the amount of such an item cannot be collected from the property assessed for the improvement.—*Smith v. City of Portland*, 297.
11. **DAMAGES — BREACH OF CONTRACT — LOSS OF TIME.**—The measure of damages for failure to complete the repairs to a mill within the time stipulated in the contract, and for the loss of time occasioned by the contractor's attempts to make the repairs conform to the requirements of the contract, is the reasonable value of the use of the mill during such time as ascertained from past experience, and not the expected profits based on an estimate of the net profit to be derived from the manufacture of a barrel of flour.—*Williams v. Island City Milling Co.* 578.
12. **IDEM.**—The measure of damages for the failure of the repairs made upon a mill to conform to the requirements of the contract is the amount which would be required to remedy the defect, and does not include loss of profits, for the time that would reasonably have been necessary to remedy the defect, where as a matter of fact the mill was never shut down for such purpose, and the defect never remedied.—*Williams v. Island City Milling Co.* 578.

CONTRIBUTORY NEGLIGENCE.

1. **RAILWAYS—CONTRIBUTORY NEGLIGENCE.**—A railway track is always a place of danger, and one who ventures to walk upon it must make vigilant use of his eyes and ears, and, upon discovering an approaching train, must leave the track if it is possible to do so; neglect of these precautions is such contributory negligence as will prevent a recovery in case injury results.—*Beck v. Vancouver Railway Co.* 32.
2. **IDEM.**—If one deliberately, and with his eyes open, goes into danger, he will not be heard to complain because he has been injured; it is his duty to use all the ordinary means that men generally use for their preservation, and if he fails in that regard, if he is apprised of the situation, and chooses a way of danger when a way of safety is open to him, he is guilty of contributory negligence, and must abide the result of his hardihood.—*Beck v. Vancouver Railway Co.* 32.
3. **CARRIERS—CONTRIBUTORY NEGLIGENCE OF PASSENGER.**—Where a passenger in a carriage is placed in imminent peril by the running away of the horses, and the driver calls on her to jump out, the question whether she is guilty of contributory negligence in so doing is for the jury.—*Budd v. United Carriage Co.* 314.
4. **IDEM.**—A carrier cannot escape liability for an injury caused by driving a team over an unsafe road by showing that the injured passenger directed him to drive over such road.—*Budd v. United Carriage Co.* 314.

CONVERSION.

1. **CONVERSION BY COTENANT—TROVER.**—Where one tenant in common claims the exclusive ownership, and applies the joint property to his own exclusive use, there is such a conversion as will enable his cotenant to bring trover against him.—*Roseman v. Syring*, 386.
2. **TROVER BY TENANT AGAINST LANDLORD.**—Where, during the term of a lease, the landlord enters and takes possession of the premises, and converts to his own use removable trade fixtures erected by the tenant for use in his business, the tenant may bring trover against the landlord unless he has surrendered the premises and abandoned the term.—*Roseman v. Syring*, 386.

CORPORATIONS.

1. **INSOLVENCY DEFINED—PREFERENCES BY CORPORATIONS.**—The term "insolvency," as used in bankrupt and insolvency proceedings, denotes the inability of a party to pay his debts as they become due in the ordinary course of business, but for general purposes the popular meaning of the word is preferable, viz., the insufficiency of the entire property of an individual or corporation to pay his or its debts. Within this definition, so long as a corporation is a "going concern," engaged in the conduct of its regular business, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities, it is not in such a state of insolvency as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, even though the debt is one for which the directors are security.—*Sabin v. Columbia Fuel Co.* 15.
2. **ASSETS OF INSOLVENT CORPORATION AS A TRUST FUND.**—The doctrine that the entire property of an insolvent corporation constitutes a trust fund which must be administered by the directors for the proportionate benefit of all creditors, without preference, can apply, if at all, only when that point is reached in the affairs of the corporation where its managers find themselves obliged to deal with its assets in view of a suspension, but not while the corporation is in good faith engaged in its usual business, although it may in fact be insolvent.—*Sabin v. Columbia Fuel Co.* 16.
3. **CONTRACT BY CORPORATION THROUGH ITS OFFICERS—COMMISSIONS.**—Officers of a corporation acting on its behalf occupy a peculiarly confidential and

CORPORATIONS—CONCLUDED.

fiduciary position, and must act solely for the best interests of the corporation, without reserving any secret advantage to themselves. A contract reserving a secret benefit to the officers is voidable by the corporation within a reasonable time after discovering the facts, and, having done so, the officers cannot recover any benefit or advantage that may have been promised them.—*Jameson v. Coldwell*, 199.

4. **CORPORATIONS—AUTHORITY OF PRESIDENT TO EXECUTE MORTGAGE—RATIFICATION BY DIRECTORS.**—The general agent of a corporation is not authorized to mortgage its property as security for a loan, without specific authority from its board of directors, but acquiescence by the board in unauthorized chattel mortgages executed by the president is presumed, where ordinary care and attention to the business would have revealed the fact of their execution, and where, after the mortgagee had taken possession of the goods under the mortgages, the board, with full knowledge of the president's act, took no steps to disaffirm his authority or to repudiate the mortgages until the lapse of several months.—*Currie v. Bowman*, 364.
5. **PREFERENCES BY CORPORATIONS.**—So long as a corporation carries on its business with the expectation of its continuance, it is not insolvent so as to avoid a preference given to a creditor.—*Currie v. Bowman*, 365.
6. **POWER OF AGENTS TO BIND CORPORATIONS—IMPLIED AUTHORITY OF AGENTS.**—The old rule that a corporation could only appoint an agent under its corporate seal is now obsolete, and it is settled that, in the absence of some restriction, a corporation may by parol confer upon an agent authority to perform any act which the corporation may lawfully do; and in some cases this authority will be implied.—*Calvert v. Idaho Stage Co.*, 412.
7. **CORPORATION—PARTNERSHIP—COOWNERSHIP.**—A corporation may become a coowner with an individual in a business or enterprise within the scope of its corporate powers, although it cannot as a general rule enter into partnership with an individual.—*Calvert v. Idaho Stage Co.* 412.

COUNTERCLAIM.

PLEADING—REPLY—COUNTERCLAIM.—In an action for work and labor done, in which a counterclaim for different items is set up, a reply alleging that the amounts of the items are less than that set forth in the counterclaim, and have been fully paid, without asking any affirmative relief, is not inconsistent with the complaint.—*Van Bibber v. Fields*, 527.

COUNTY COURT.

1. **ROAD SUPERVISORS—TAKING MATERIAL—INJUNCTION—CODE, § 4092.**—A road supervisor, acting in good faith, cannot be enjoined from taking soil and gravel from neighboring lands for the repair of his roads, as Hill's Code, § 4092, confides the matter to his judgment, and the owner's rights are protected by his opportunity to claim damages in the county court.—*Cherry v. Matthews*, 484.
2. **DAMAGES FOR PROPERTY TAKEN TO REPAIR ROADS—COUNTY COURT.**—Where a road supervisor enters upon land under the statute, and takes material for a road, an action for damages will not lie against the county for trespass, the sole remedy being by application to the county court to assess the damages, and the action of such court is final. *Kendall v. Post*, 8 Or. 144, approved and followed.—*Cherry v. Lane Co.* 487.

COUNTY ROADS. See ROAD SUPERVISORS.

COVENANTS.

1. **LEASE—REPAIRS.**—In the absence of a covenant to repair a tenant should so use the property leased as to avoid the necessity for repairs. Every lease has

COVENANTS—CONCLUDED.

an implied covenant to that effect on the part of the lessee.—*Fleischner v. Citizens' Investment Co.* 119.

2. COVENANT AGAINST INCUMBRANCES KNOWN TO GRANTEE.—The fact that an incumbrance not excepted from the operation of a covenant was known to the grantee is no defense to an action for breach of such covenant.—*Corbett v. Wrenn*, 305.
3. PLEADING—ACTIONS SOUNDING IN CONTRACT OR TORT—CODE, §§ 67 AND 98.—A complaint which alleges that defendant sold certain land to plaintiff with a representation and a covenant that there were no incumbrances thereon except a mortgage for a specified amount; that said representation was false, and was so known to be by the defendant when made; and that plaintiff purchased in reliance on said representation; and was subsequently compelled to pay a much larger sum to release said mortgage, is open to a motion to strike out, under section 85 of Hill's Code, or to a demurrer for misjoinder of cause of action, under sections 67 and 98, since the allegations sound in both tort and contract; but in the absence of such pleadings it is properly treated as an action for breach of covenant.—*Corbett v. Wrenn*, 305.
4. BREACH OF COVENANT—MITIGATION OF DAMAGES.—In an action for breach of covenant against incumbrances, evidence for defendant that plaintiff paid off an outstanding incumbrance complained of before maturity, else he would not have had to pay more than he was allowed therefor on the purchase price, is inadmissible to defeat the action, as the covenant is in fact broken, although it might be allowed in mitigation of damages.—*Corbett v. Wrenn*, 305.
5. BREACH OF COVENANT AGAINST INCUMBRANCES.—A covenant against incumbrances is broken so as to entitle the grantee to at least nominal damages, if at its date there was an outstanding incumbrance on the property not excepted from the operation of the covenant; and where the grantee pays off an incumbrance not excepted from the covenant, the amount so paid may be recovered from the grantor, less whatever the grantee may have agreed to pay for that purpose.—*Corbett v. Wrenn*, 305.

CRIMINAL EVIDENCE. See EVIDENCE, 18-19.

CRIMINAL LAW.

1. INDICTMENT—FALSE PRETENSES—CODE, § 1777.—An indictment under section 1777 of Hill's Code, for obtaining money by false pretenses, is sufficient in charging that defendant did obtain the money by means of certain specified false representations, without alleging that the person defrauded relied upon such representations.—*State v. Bloodsworth*, 88.
2. PRACTICE IN CRIMINAL CASES—MOTION TO DISMISS—DEMURRER—CODE, §§ 1322, 1330.—An objection that an indictment for obtaining money under false pretenses does not sufficiently describe the false token, must be made by demurrer, and cannot be raised for the first time at the trial by a motion to dismiss.—*State v. Bloodsworth*, 84.
3. SEDUCTION UNDER PROMISE OF MARRIAGE—CODE, § 1863.—Where a woman yields her virtue to a man, relying upon his promise to marry her in case she becomes pregnant from the act, she is not seduced "under promise of marriage." These words contemplate that the seduction must be accomplished by means of an absolute promise of marriage, or one that becomes absolute the moment the woman yields.—*State v. Adams*, 172.
4. HOMICIDE—DELIBERATION AND PREMEDITATION.—An instruction on a trial for murder, that the time occupied by defendant in going from one specified place to another was sufficient to afford him opportunity for deliberation and premeditation, is not erroneous where the evidence shows that the defend-

CRIMINAL LAW—CONTINUED.

- ant's mind was in its normal state, and that nothing had occurred prior to the killing to arouse his passion.—*State v. Morey*, 241.
5. **MURDER—INSTRUCTION ON DELIBERATION AND PREMEDITATION.**—To constitute murder in the first degree, it is not necessary that the deliberate intent to kill should have been formed for any specific length of time prior to the commission of the act, but it is enough that it existed at the moment of the killing, provided that it was formed when the mind was in its normal state, under the control of the slayer, and not in the heat of passion; and ordinarily the question of whether there was deliberation will be left to the jury under all the circumstances of the case. Where, however, the conceded fact is that the defendant was not in any degree whatever excited or disturbed, and there was no question of cooling time in the case, the court may properly instruct the jury that the time required to walk from the street into the first story of a building was sufficient to afford opportunity for deliberation and premeditation.—*State v. Morey*, 241.
 6. **HOMICIDE—SELF-DEFENSE.**—The right of self-defense does not depend wholly upon the belief which the person claiming it entertained, but whether or not there was ground for a reasonable belief on his part that he was in danger of death or great bodily harm.—*State v. Morey*, 241.
 7. **HOMICIDE—CHARACTER OF DECEASED.**—If there is testimony tending to show that the defendant was assailed by the deceased, and was in apparent danger the jury may consider that the deceased was turbulent, violent, and desperate, in determining whether defendant had reasonable cause to apprehend great personal injury; but unless the defendant was, or believed himself to be, in imminent danger of death or great bodily harm, the bad character of the deceased is immaterial, since it is as great a crime to kill a badman as a good one.—*State v. Morey*, 241.
 8. **REASONABLE DOUBT.**—An instruction that a "reasonable doubt" is such a doubt as a juror can give a reason for is not reversible error, when given in connection with other instructions by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one.—*State v. Morey*, 242.
 9. **BURGLARY—CONSTRUCTIVE BREAKING.**—Code, §§ 1768, 1762.—Under an indictment for burglary charging a forcible breaking, it is sufficient to show that the entry was unlawful and without force. Section 1762, Hill's Code, enlarges the scope of section 1768 so that any unlawful entry is a breaking and entering.—*State v. Huntley*, 349.
 10. **WITNESS—CONTRADICTORY STATEMENTS.**—Accused of having, before consulting counsel, formally confessed that he struck his wife the fatal blow after she had quarreled with and thrown a rock at him, and a witness having sworn that accused told him that he struck the blow without provocation, on a sudden impulse, which he could not explain, there was no error in admitting testimony that such statement was made after accused had consulted with his counsel, there having been no effort made to argue that the defense of insanity was devised by counsel at such visit, or to show what occurred at the visit at all.—*State v. Hansen*, 391.
 11. **HOMICIDE—CORROBORATIVE EVIDENCE OF DELIBERATION.**—Where there is evidence that before the crime defendant had no money, that when he was arrested the day following he had over fifty dollars, that deceased kept her money in a bureau drawer and carried the key in her pocket, and that when the body was discovered the key was not in it, and that defendant opened some of the drawers of the bureau before he notified any one of her death, it is a question of fact for the jury whether defendant had deliberated and premeditated upon the commission of the act.—*State v. Hansen*, 392.

CRIMINAL LAW—CONCLUDED.

12. **HOMICIDE—INSTRUCTION TO JURY.**—An instruction on a trial for murder, that if deliberation, premeditation, malice, "or," cool blood existed, and the killing is the result of "them," the fact that defendant was intoxicated when he committed the crime is no defense, is not reversible error, notwithstanding the use of the word "or," as by the use of the word "them" it follows that all of the elements described were necessary to overcome the fact of intoxication if it existed.—*State v. Hansen*, 392.
13. **INTENT AS A TEST OF CRIMINAL LIABILITY—INTOXICATION—HILL'S CODE, § 1858.**—Where the existence of a particular motive, purpose, or intent is necessary to constitute a particular species or degree of crime, and intoxication is an element of the defense, (Hill's Code, § 1858,) the intent is the test of criminal liability, regardless of the motive or purpose.—*State v. Hansen*, 392.

CROSS EXAMINATION.

1. **SCOPE OF CROSS-EXAMINATION—CODE, § 878.**—Under the terms of section 878 of Hill's Code, a party may not cross-examine a witness on any matters other than those stated in the direct examination, or properly connected therewith; but within these limits the cross-examination should be liberal, and may properly extend to other matters that tend to limit, explain, or modify the facts stated on direct examination, provided they are directly connected therewith.—*Ah Doon v. Smith*, 89.
2. **ILLEGALITY OF CONTRACT SHOWN BY CROSS-EXAMINATION.**—Where plaintiff, in an action on contract, discloses on his examination in chief only so much of the transaction as leaves an inference of the contract's legality, it is proper for defendant to bring out on cross-examination the remaining facts and circumstances under which the contract arose, and which show its illegality.—*Ah Doon v. Smith*, 89.
3. **CROSS-EXAMINATION—WITNESSES—CODE, § 887.**—The right of cross-examination is a substantial and important one, and though its proper application rests primarily in the discretion of the trial court, that discretion will be reviewed in some cases. In practice a wide latitude should be allowed the adverse party in order that all the facts within the knowledge of the witness may be disclosed in their proper proportions and relations. Thus in an action to recover money alleged to have been collected by defendant as plaintiff's agent, where defendant alleges that he paid a designated amount to plaintiff through her husband, out of which plaintiff's claims should be satisfied, and the husband has testified in rebuttal that the money so paid was due him on account of a partnership existing between himself and defendant, and collections made by defendant as receiver and otherwise on accounts due him and another as partners, he may properly be cross-examined as to the nature and business of such partnership, and as to the collections and the receivership.—*Sayers v. Allen*, 211.

DAM.

Injunction to Restrain Erection of. See INJUNCTION, 2.

DAMAGES.

1. **ABANDONED APPEAL—DAMAGES.**—Damages will not be allowed to respondent in case of an abandoned appeal where the appellant, before the time for appeal had expired, offered to pay the judgment, and the transcript was filed by respondent.—*Lester v. Elwert*, 102.
2. **EQUITY—NUISANCE—IRREPARABLE DAMAGE.**—Whenever a nuisance will cause an irreparable injury, or its continuance will result in numerous damage actions, equity will interfere, as it has "concurrent jurisdiction with courts of law" under section 390, Hill's Code.—*Fleischer v. Citizens Investment Co.* 119.

DAMAGES—CONCLUDED.

3. **RATIFICATION OF CONTRACT BY CLAIMING DAMAGES.**—Where an agent whose unauthorized contract of purchase has been repudiated by his principal sues the seller for the secret commission promised him, the seller does not by setting up a counterclaim for damages ratify the contract so as to make him liable for the commissions. — *Jameson v. Caldwell*, 200.
4. **BREACH OF PROMISE—SEDUCTION AS AN ELEMENT OF DAMAGES—CODE, § 36.**—In actions for breach of promise, seduction under the promise may be shown in aggravation of damages, notwithstanding section 36, Hill's Code, which gives to an unmarried woman over twenty-one years of age a right of action for her own seduction. — *Osmun v. Winters*, 260.
5. **IDEM.**—While a jury may consider seduction in estimating damages for a breach of promise to marry, they are not obliged to do so, and an instruction that the jury "must" so consider it, is prejudicial error. — *Osmun v. Winters*, 260.
6. **BREACH OF COVENANT—MITIGATION OF DAMAGES.**—In an action for breach of covenant against incumbrances, evidence for defendant that plaintiff paid off an outstanding incumbrance complained of before maturity, else he would not have had to pay more than he was allowed therefor on the purchase price, is inadmissible to defeat the action, as the covenant is in fact broken, although it might be allowed in mitigation of damages. — *Corbett v. Wrenn*, 306.
7. **BREACH OF COVENANT AGAINST INCUMBRANCES.**—A covenant against incumbrances is broken so as to entitle the grantee to at least nominal damages, if at its date there was an outstanding incumbrance on the property not excepted from the operation of the covenant, and where the grantee pays off an incumbrance not excepted from the covenant, the amount so paid may be recovered from the grantor, less whatever the grantee may have agreed to pay for that purpose. — *Corbett v. Wrenn*, 306.
8. **DAMAGES FOR PROPERTY TAKEN TO REPAIR ROADS—COUNTY COURT.**—Where a road supervisor enters upon land under the statute, and takes material for a road, an action for damages will not lie against the county for trespass, the sole remedy being by application to the county court to assess the damages, and the action of such court is final. — *Cherry v. Lane Co.* 487.
9. **CONSTITUTIONAL LAW—HIGHWAYS—TAKING MATERIAL FROM LAND.**—Hill's Code, §§ 4092, 4093, authorizing road supervisors to take material for a road from land in their district, and providing for the assessment of damages thereafter by the county court, is constitutional, as the State Constitution, article I., § 18, provides that prepayment need not be made for property taken by the state for public use. — *Cherry v. Lane Co.* 487.
10. **DAMAGES—BREACH OF CONTRACT—LOSS OF TIME.**—The measure of damages for failure to complete the repairs to a mill within the time stipulated in the contract, and for the loss of time occasioned by the contractor's attempts to make the repairs conform to the requirements of the contract, is the reasonable value of the use of the mill during such time as ascertained from past experience, and not the expected profits based on an estimate of the net profit to be derived from the manufacture of a barrel of flour. — *Williams v. Island City Milling Co.* 578.
11. **IDEM.**—The measure of damages for the failure of the repairs made upon a mill to conform to the requirements of the contract is the amount which would be required to remedy the defect, and does not include loss of profits, for the time that would reasonably have been necessary to remedy the defect, where as a matter of fact the mill was never shut down for such purpose, and the defect never remedied. — *Williams v. Island City Milling Co.* 578.

DEATH BY WRONGFUL ACT.

- PARENT AND CHILD—DEATH BY WRONGFUL ACT—CODE, § 34.**—The word "child," as used in section 34, Hill's Code, providing that "a father, or in case of the

DEATH BY WRONGFUL ACT—CONCLUDED.

death or desertion of his family, the mother, may maintain an action as plaintiff for the death or injury of a child," means a minor child.—*Craft v Northern Pacific Railroad Co.* 275.

DEDICATION.

1. **DEDICATION OF STREET—DONATION LAND LAW.**—A dedication for a street of a strip of the public domain, made before the passage of the donation law, is not binding on one who subsequently, under such law, acquires title to a tract containing the strip so dedicated.—*Lewis v. City of Portland*, 133.
2. **DEDICATION OF STREETS BY REFERENCE TO MAPS OR PLATS—ESTOPPEL.**—An owner of a tract of land is not estopped from denying that a certain strip of land is a street merely because he deeded lots in said tract by reference to the name under which the tract was platted, and a lithographic map in general circulation in that community showed the strip in question to be a street, where it appears that there were several maps of the addition, and it is not shown that the owner ever knew of or recognized the lithographic map.—*Lewis v. City of Portland*, 133.
3. **IDEM.**—Where an owner of a tract of land, having platted part of it, showing that a certain strip is not a street, afterwards files a plat of an addition to his first plat, and for the purpose of showing its position relative to the land before platted, extends in blank, without names or numbers, the blocks and streets of the first plat, and on this blank extension shows the same strip of land to be a street, he does not dedicate such strip for a street, since the dedication on the second map is only of the new land thereon platted.—*Lewis v. City of Portland*, 133.
4. **DEDICATION OF STREET—INTENTION—USER.**—A dedication of land to public use rests entirely on the intent or assent of the owner, and when the evidence of it rests in parol it must be of such a deliberate and decisive character as to leave no doubt of the owner's intention.—*Lewis v. City of Portland*, 133.
5. **EVIDENCE OF DEDICATION BY USER.**—Though a passage way to a wharf was used by the public without objection for over twenty years, such fact does not show a dedication by user, where the owner always claimed to own the way, maintained a gate at the mouth of it part of the time, improved it and kept it in repair, and exercised general control over it.—*Lewis v. City of Portland*, 133.

DEEDS.

1. **TAX SALES—EVIDENCE OF IRREGULARITY OF PROCEEDINGS.**—In the absence of a provision making a tax deed *prima facie* evidence of the irregularity of the proceedings anterior thereto, the claimant under such a deed must show the regularity and completeness of every step required by the statute in the assessment and collection of the tax.—*Bays v. Trulson*, 109.

REFORMATION OF DEED. See REFORMATION OF WRITTEN INSTRUMENTS.

2. **PUBLIC LANDS—INTENTION OF PARTIES.**—The intention of the parties to a patent to land under section 5 of the act of congress approved September twenty-seventh, eighteen hundred and fifty, providing for granting to settlers one hundred and sixty acres of land, must be ascertained from the actual survey as originally made upon the land; and the description of the premises by courses and distances must yield to visible or ascertained monuments.—*Kanne v. Oty*, 531.

DEFAULT.

In Payments under Contract of Purchase. See **CONTRACTS**, 1.
XXV, OR.—40

DELIBERATION AND PREMEDITATION.

Time required to form Intention when Mind is calm. See **CRIMINAL LAW**, 4, 5.

Insanity — Intoxication. See **INSANITY**.

Corroborative Evidence of Deliberation. See **CRIMINAL EVIDENCE**, 5.

DEMAND.

1. **TROVER — DEMAND BEFORE SUIT — PLEADING TITLE IN DEFENDANT.** — Where defendant denies plaintiff's title, and pleads ownership and right to the possession in himself or another, he cannot defeat recovery on the ground that plaintiff did not allege and prove demand before suit. — *Rosenow v. Syring*, 886.

DEMURRER.

1. **PRACTICE IN CRIMINAL CASES — MOTION TO DISMISS — DEMURRER — CODE**, §§ 1822, 1830. — An objection that an indictment for raising money under false pretenses does not sufficiently describe the false token, must be made by demurrer, and cannot be raised for the first time at the trial by a motion to dismiss. — *State v. Bloodworth*, 84.
2. **PLEADING — ACTIONS SOUNDING IN CONTRACT OR TORT — CODE**, §§ 67 and 93. — A complaint which alleges that defendant sold certain land to plaintiff with a representation and a covenant that there were no incumbrances thereon except a mortgage for a specified amount; that said representation was false, and was so known to be by the defendant when made; and that plaintiff purchased in reliance on said representation; and was subsequently compelled to pay a much larger sum to release said mortgage, is open to a motion to strike out, under section 85 of Hill's Code, or to a demurrer for misjoinder of causes of action, under sections 67 and 93, since the allegations sound in both tort and contract; but in the absence of such pleadings it is properly treated as an action for breach of covenant. — *Corbett v. Wren*, 305.

DERRICK.

MECHANIC'S LIEN — DERRICK — FIXTURE. — A derrick erected by a tenant in a quarry by placing a post upright in a socket upon the ground with guy ropes extending from its top to stakes set in the ground, is a trade fixture and not subject to a lien. — *Honeyman v. Thomas*, 539.

DESCRIPTION.

PUBLIC LANDS — INTENTION OF PARTIES. — The intention of parties to a patent to land under section 5 of the act of congress approved September twenty-seventh, eighteen hundred and fifty, providing for granting to settlers one hundred and sixty acres of land, must be ascertained from the actual survey as originally made upon the land; and the description of the premises by courses and distances must yield to visible or ascertained monuments. — *Kane v. Ott*, 531.

DIRECTORS and Officers of a corporation occupy a peculiarly confidential and fiduciary position and must in all cases act solely for the best interests of the corporation, without reserving any advantages or benefit to themselves. — *Jameson v. Caldwell*, 199.

ACQUIESCENCE IN ACTS OF OFFICERS. — Acquiescence of the directors in the unauthorized acts of the officers will be presumed, where ordinary attention to the conduct of the business would have shown that the officers had exceeded their authority. — *Currie v. Bowman*, 865.

DISCRETION of a City Council will not be reviewed by the courts as long as it is honestly exercised. — *Or. & Cal. R. R. v. City of Portland*, 229; *Avery v. Job*, 512.

DISMISSING INDICTMENT. See **INDICTMENT**.

DONATION LAND LAW.

DEDICATION TO PUBLIC USE.—A dedication to public use of a strip of the public domain, made before the passage of the donation land law, is not binding on one who, under such law, subsequently obtains title to the land so dedicated.—*Lewis v. City of Portland*, 183.

DOWER.

1. **EFFECT OF ADMINISTRATOR'S SALE ON WIDOW'S DOWER**—CODE, § 1183.—A widow's right of dower is unaffected by an administrator's sale of realty for the payment of debts of the deceased, under section 1153, Hill's Code, which authorizes the administrator to sell only "the estate, right, and interest of the testator in the premises at the time of his death," whether the debts be a lien on the land, or only simple contract debts.—*Whiteaker v. Bell*, 490.
2. **ESTOPPEL**.—Where the widow has done nothing to lead a purchaser at an administrator's sale to believe that he would acquire a title free from her dower, she is not estopped to claim dower by the fact that the proceeds were used to pay a mortgage debt under which her dower was about to be sold.—*Whiteaker v. Bell*, 490.

DUE PROCESS OF LAW.

1. **LOCAL IMPROVEMENTS—ASSESSMENT ON PROPERTY NOT BENEFITED—DUE PROCESS OF LAW**.—The enforcement of an assessment for local improvements upon property not at all benefited thereby is the taking of property without the due process of law.—*Or. & Cal. R. R. Co. v. City of Portland*, 229.
2. **EMINENT DOMAIN—TAKING ROAD MATERIAL—DUE PROCESS OF LAW—HILL'S CODE, §§ 4092, 4093**.—Section 4092, Hill's Code, authorizing road supervisors to summarily take materials needed for the public roads, and section 4093, providing that a party aggrieved in such cases may apply to the county court and have his damages assessed, are not unconstitutional as taking property without due process of law; for under section 18 of article I. of the state constitution, compensation need not be made before taking property for the use of the commonwealth, and the provisions of section 4093 afford abundant opportunity for a hearing on the question of damages. In such cases the county court, composed of the supervisors and the county judge, acts judicially, and must be deemed an impartial tribunal.—*Branson v. Gee*, 462.

DUPLICITY.

PLEADING—ASSUMPSIT—DUPLICITY.—A complaint alleging that plaintiff on specified dates "loaned defendant money, furnished him goods, wares, and merchandise, and paid out money at his request" to a designated amount, and that defendant agreed and promised to pay plaintiff therefor,—states but one cause of action. It is not duplicitous, for it states only the facts connected with the one promise which is the basis of the action.—*Hough v. Hough*, 218.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—PLEA IN ABATEMENT—CODE, § 3263**.—Under the provisions of section 3263 of Hill's Code, a landowner, in an action to condemn a right of way across his property, may unite in his answer any legal defenses with a claim for damages; and under this rule a denial of corporate existence need not be set forth as a plea in abatement in such cases.—*Bridal Veil Lumbering Co. v. Johnson*, 105.
2. **EMINENT DOMAIN—TAKING ROAD MATERIAL—DUE PROCESS OF LAW—CODE, §§ 4092, 4093**.—Section 4092, Hill's Code, authorizing road supervisors to summarily take materials needed for the public roads, and section 4093, providing that a party aggrieved in such cases may apply to the county court and have his damages assessed, are not unconstitutional as taking property without due process of law; for under section 18 of article I. of the state constitution,

EMINENT DOMAIN—CONCLUDED.

compensation need not be made before taking property for the use of the commonwealth, and the provisions of section 4698 afford abundant opportunity for a hearing on the question of damages. In such cases the county court, composed of the supervisors and the county judge, acts judicially, and must be deemed an impartial tribunal.—*Branson v. Gee*, 462.

EQUITY.

1. **INJUNCTION—NUISANCE—EQUITY.**—A court of equity will restrain the continuance of a nuisance when the complainant will sustain some irreparable injury, or be compelled to resort to a multiplicity of actions for damages; but this general rule is subject to this limitation, that the complainant must allege and prove that he has sustained some private, direct damage other than that suffered by the public at large.—*Essex v. Wattier*, 7.
2. **INJUNCTION—NUISANCE.**—To justify a court of equity in interfering by injunction to abate a nuisance, the nuisance must be an actual existing offense, and not merely apprehended.—*Essex v. Wattier*, 7.
3. **JURISDICTION OF EQUITY TO REFORM WRITTEN CONTRACTS.**—To justify a court of equity in reforming a written contract, it should clearly appear that there was some relation of trust or confidence between the parties that has been abused, or that there was fraud, or fraud on one side accompanied by mistake on the other, or that the means of knowing the facts were not equally open to both parties.—*Kleinsorge v. Rohac*, 51.
4. **FRAUD—CANCELLING DEED—FIDUCIARY RELATION OF PRINCIPAL AND AGENT.**—A trustee or agent is bound to entire truthfulness and good faith toward his principal, and if by false representations he induces the latter to sell him property for less than its value, the conveyance will be set aside in equity.—*Shute v. Johnson*, 59.
5. **IDEM.**—Where plaintiff listed his land with defendant, a real estate agent, for exchange, and, relying on defendant's representation that certain land of his was worth as much as plaintiff's, exchanged his lands therefor, his deed to defendant will be canceled where defendant grossly misrepresented the value of his land; since plaintiff has a right to rely on defendant's representations because of the fiduciary relations existing between them.—*Shute v. Johnson*, 59.
6. **CONTRACT—BROKER—EQUITY.**—Under a contract by a real estate broker for the sale of lands, providing that when the owner has received a designated amount in actual cash from the sale of the property, if realized during the existence of the contract, he will convey to the broker all the unsold lots and all the notes wholly or partly unpaid, the broker may recover from the owner an amount advanced to prevent a forfeiture of the contract after the latter has received in actual cash the full sum contracted for within the time agreed upon, where a total failure of the title after full performance of the agreement precludes the broker from selecting any property in repayment of the amount advanced.—*Bartholomew v. Asmack*, 78.
7. **NUISANCE—JURISDICTION OF EQUITY—CODE, §§ 333, 380.**—The remedy provided by section 333 of Hill's Code, in cases of nuisance, is not exclusive, and does not limit the remedy for nuisances to actions at law; whenever a nuisance will cause an irreparable injury, or numerous damage actions will be required, equity has "concurrent jurisdiction with courts of law" within the meaning of section 380, Hill's Code, and will enjoin the continuance of the objectionable conditions.—*Fleischer v. Citizens' Investment Co.* 119.
8. **EQUITY—JURY TRIAL—CONSTITUTION, ARTICLE I., § 17.**—A court of equity which has gained jurisdiction of a suit to restrain a private nuisance may render judgment for damages as an incident to the suit for injunction, not-

EQUITY—CONCLUDED.

withstanding section 17 of article 1. of the state constitution, providing that "in all civil cases the right of trial by jury shall remain inviolate." These words continued to all suitors the right of trial by jury in all cases where it was secured to them by the laws or practices of the courts at the time of the adoption of the constitution, but were not intended to abridge the equity jurisdiction then existing. As equity had jurisdiction to restrain nuisances prior to the adoption of the constitution, the jurisdiction still continues, and the matter of damages is only an incident.— *Fleischner v. Ottens' Investment Co.* 119.

9. **SUIT TO REFORM A DEED—PLEADING.**—In a suit to reform a written instrument, the complaint should show the original agreement of the parties, should point out clearly wherein the writing differs from the agreement, and that such difference was caused by fraud or mutual mistake, and did not arise from the gross negligence of the plaintiff; but in the absence of a demurrer the complaint will be held sufficient if it alleges that to make the writing conform to the actual intention of the parties it should be amended in certain specified particulars.— *Osborn v. Ketchum*, 352.
10. **EVIDENCE TO REFORM A DEED.**—Evidence that the parties to a deed to premises conveyed before any survey was made counted the panels in a fence on the east side, and estimated them at one rod to the panel, and allowed two rods to make the line extend to the center of the road, and estimated that the west boundary would intersect the road at a gate near some willows; and that defendant told three witnesses how the length of the east boundary was obtained, and that the west boundary would probably intersect the road near a strawstack, which is shown to be near the willows,—is sufficient to sustain a judgment for the reformation of the deed so as to convey to the center of the road, although the original conveyance was by metes and bounds which left a portion of the land next to the road unconveyed, as shown by a subsequent survey, and the land is still in the hands of the original grantor.— *Osborn v. Ketchum*, 352.
11. **EQUITABLE ASSIGNMENT—EVIDENCE.**—An equitable assignment of promissory notes as collateral security, by a corporation to one of its creditors, is not established, where the note was never indorsed and the subject of their delivery as collateral is conflicting, and the authority of the person who is claimed to have made such delivery is doubtful.— *Currie v. Bowman*, 865.
12. **WATERS—PAROL LICENSE—REVOCATION.**—A parol license to divert a certain quantity of water for irrigating purposes is not revocable by the licensor after the licensee has expended his money and labor in digging a ditch and preparing his land for the use of the water upon the faith of such parol license; and the grantee of the riparian owner having notice of such license takes subject to it.— *McBroom v. Thompson*, 559.

ESTATES OF DECEDENTS.

1. **EFFECT OF ADMINISTRATOR'S SALE ON WIDOW'S DOWER—CODE, § 1153.**—A widow's right of dower is unaffected by an administrator's sale of realty for the payment of debts of the deceased, under section 1153, Hill's Code, which authorizes the administrator to sell only "the estate, right, and interest of the testator in the premises at the time of his death," whether the debts be a lien on the land, or only simple contract debts.— *Whiteaker v. Bell*, 490.
2. **ESTOPPEL.**—Where the widow has done nothing to lead the purchaser at an administrator's sale to believe that he would acquire a title free from her dower, she is not estopped to claim dower by the fact that the proceeds were used to pay a mortgage debt under which her dower was about to be sold.— *Whiteaker v. Bell*, 490.

ESTATES OF DECEDENTS—CONCLUDED.

3. ESTATES OF DECEDENTS—APPOINTMENT OF CREDITOR AS ADMINISTRATOR.—A petition by one who alleges himself to be the principal creditor of a decedent's estate, asking for the appointment of petitioner as administrator of the estate and for the removal of another creditor who has been appointed administrator, is insufficient unless it avers the facts which make him the principal creditor,—a general allegation to that effect is not sufficient.—*Cusick v. Hammer*, 472.
4. ADMINISTRATION—ALLOWANCE OF CLAIM—EVIDENCE.—Under Hill's Code, §1184, providing that no claim rejected by an administrator shall be allowed, except upon evidence other than that of the claimant, the production of a note, with payments endorsed thereon after such note was barred by the statute, and the testimony of a stranger that decedent once gave him money to deliver to plaintiff as payment "on that note," does not identify the note, or show part payment of an admitted larger debt, and is insufficient to establish such claim, for in order to give a payment made on a debt against which the statute has run the effect of reviving an obligation, it must clearly appear that it was made and received as part of a larger indebtedness, and under such circumstances as to warrant a jury in finding an implied promise to pay the balance.—*Harding v. Grim*, 506.

ESTOPPEL.

1. PLEADING ESTOPPEL.—The rule is well settled that an estoppel by deed or record must be pleaded to be available either as a cause of action or as a defense.—*Bays v. Trulson*, 109.
2. DEDICATION OF STREETS BY REFERENCE TO MAPS OR PLATS—ESTOPPEL.—An owner of a tract of land is not estopped from denying that a certain strip of land is a street merely because he deeded lots in said tract by reference to the name under which the tract was platted, and a lithographic map in general circulation in that community showed the strip in question to be a street, where it appears that there were several maps of the addition, and it is not shown that the owner ever knew of or recognized the lithographic map.—*Lewis v. City of Portland*, 183.
3. ESTOPPEL.—Where the widow has done nothing to lead a purchaser at an administrator's sale to believe that he would acquire a title free from her dower, she is not estopped to claim dower by the fact that the proceeds were used to pay a mortgage debt under which her dower was about to be sold.—*Whiteaker v. Bell*, 490.
4. ESTOPPEL—IRRIGATION—PERMITTING IMPROVEMENTS TO BE MADE WITHOUT OBJECTION.—Where, for a series of years, riparian owners and their grantors have acquiesced in the diversion of a part of a stream by a person who is not a riparian owner, and such person has yearly aided in keeping the channel of the stream open, and expended money on his farm, which would be worthless without the water, a court of equity will not enjoin a further diversion of the water at the suit of such riparian owners.—*McBroom v. Thompson*, 569.

EVIDENCE.

I. CIVIL EVIDENCE.

II. CRIMINAL EVIDENCE.

I. CIVIL EVIDENCE.

1. CHATTEL MORTGAGE—EVIDENCE OF FRAUD.—Where an employé of a person operating a store takes a mortgage on the goods, which is not recorded, the fact that he thereafter purchases other goods without disclosing the fact that he claimed possession of the goods in the store under his mortgage, does not necessarily raise a presumption of fraud if he paid for them; but, if the pur-

CIVIL EVIDENCE—CONTINUED.

- chase is made through a prior employé of the mortgagor, without notice to the seller of the change in his employment, it tends to show that there was no such change in the possession of the goods in the store.—*Pierce v. Kelly*, 96.
2. **TAX SALES—EVIDENCE OF REGULARITY OF PROCEEDINGS.**—In the absence of a provision making a tax deed *prima facie* evidence of the regularity of the proceedings anterior thereto, the claimant under such a deed must show the regularity and completeness of every step required by the statute in the assessment and collection of the tax.—*Bays v. Trulson*, 109.
 3. **PAROL EVIDENCE TO CONTRADICT A RECORD.**—The rule is that where a record is not required to be made, but one is kept, it may be explained or supplied by parol testimony, but where a statute requires a record, as in the case of a sale of property for taxes or street improvements, parol testimony cannot be received to contradict or vary the record after it has once been made; thus, where it appears from the return of an officer on a warrant for the sale of certain lots for an unpaid street assessment that the lots were sold *en masse*, it cannot be shown by parol that the lots were in fact sold singly, since that would be to vary a record which the law required to be made.—*Bays v. Trulson*, 110.
 4. **EVIDENCE OF DEDICATION BY USER.**—Though a passage way to a wharf was used by the public without objection for over twenty years, such fact does not show a dedication by user, where the owner always claimed to own the way, maintained a gate at the mouth of it part of the time, improved it, and kept it in repair, and exercised general control over it.—*Lewis v. City of Portland*, 183.
 5. **BREACH OF PROMISE—STATEMENTS BY PLAINTIFF.**—In an action for breach of promise of marriage, in which defendant denies having made the offer, evidence that plaintiff, in the absence of defendant, told other persons of the engagement, is inadmissible.—*Oemus v. Winters*, 260.
 6. **BREACH OF PROMISE—EVIDENCE.**—In an action for breach of a promise of marriage, it is proper to show how the parties were treated by their friends, and their own conduct towards each other. *Kelly v. Highfield*, 15 Or. 277, approved and followed.—*Oemus v. Winters*, 260.
 7. **EVIDENCE OF REPUTATION OF WITNESS.**—It is not competent to show the reputation of a witness for truth and veracity unless such reputation has been attacked.—*Oemus v. Winters*, 260.
 8. **WRIT OF REVIEW—EVIDENCE.**—A writ of review does not bring up questions as to the admissibility of evidence, but only questions as to jurisdiction, and as to the correctness of the judgment on the ultimate facts appearing in the record.—*Smith v. City of Portland*, 297.
 9. **PAROL EVIDENCE TO ESTABLISH A RESULTING TRUST.**—Parol evidence is admissible to establish a resulting trust in land in favor of one paying the purchase price therefor, where another takes the legal title, notwithstanding a recital in the deed that the consideration was paid by the grantee, but the evidence of it must be clear and convincing, and if attended by doubt and uncertainty the writing must remain the highest and best evidence.—*Snider v. Johnson*, 328.
 10. **EVIDENCE OF RESULTING TRUST.**—Where the testimony was conflicting as to whether land was bought with a mother's or her son's money, whether the bond for a deed was taken in her name for herself or to protect his interests as a minor, and whether she directed the deed to be made to him or to her, and the evidence showed that at her request the bond for a deed was never recorded, that the deed was made to the son, and that she delayed over twenty years before she demanded a deed to herself in accordance with his bond, a trust on behalf of the mother is not established.—*Snider v. Johnson*, 328.

CIVIL EVIDENCE—CONCLUDED.

11. **EVIDENCE TO REFORM A DEED.**—Evidence that the parties to a deed to premises conveyed before any survey was made counted the panels in a fence on the east side, and estimated them at one rod to the panel, and allowed two rods to make the line extend to the center of the road, and estimated that the west boundary would intersect the road at a gate near some willows; and that defendant told three witnesses how the length of the east boundary was obtained, and that the west boundary would probably intersect the road near a strawstack, which is shown to be near the willows,—is sufficient to sustain a judgment for the reformation of the deed so as to convey to the center of the road, although the original conveyance was by metes and bounds which left a portion of the land next to the road unconveyed, as shown by a subsequent survey, and the land is still in the hands of the original grantor.—*Osborn v. Kelchum*, 352.
12. **PROMISSORY NOTE—STATUTE OF LIMITATIONS—EVIDENCE.**—An indorsement of a credit on a promissory note, made after the statute has run against it, is no evidence that the payment representing such credit was made.—*Harding v. Grim*, 506.
13. **ADMINISTRATION—ALLOWANCE OF CLAIM—EVIDENCE.**—Under Hill's Code, § 1124, providing that no claim rejected by an administrator shall be allowed, except upon evidence other than that of the claimant, the production of a note, with payments indorsed thereon after such note was barred by the statute, and the testimony of a stranger that decedent once gave him money to deliver to plaintiff as payment "on that note," does not identify the note, or show part payment of an admitted larger debt, and is insufficient to establish such claim, for in order to give a payment made on a debt against which the statute has run the effect of reviving an obligation, it must clearly appear that it was made and received as part of a larger indebtedness, and under such circumstances as to warrant a jury in finding an implied promise to pay the balance.—*Harding v. Grim*, 506.
14. **BOUNDARIES—LATENT AMBIGUITY—PUBLIC LANDS—PAROL EVIDENCE.**—Where there is an ambiguity in the descriptive words of a grant respecting the quantity, character, or duration of the estate conveyed, evidence of the intention of the parties is admissible to interpret it; and such an ambiguity exists where a boundary line of a government patent was not in fact surveyed on the line there indicated.—*Kanne v. Otty*, 531.
15. **EVIDENCE OF ADVERSE POSSESSION.**—On an issue as to the location of a boundary line, plaintiff relied on the establishment of a county road on the boundary claimed by him, and the removal by his grantor of a fence thereto for about two thirds of the distance across the claim, so as to inclose part of the land in dispute, and the cultivation of the land so inclosed. There was no direct evidence that such grantor intended to claim the tract adversely, and it appeared that when a surveyor, after plaintiff purchased, discovered the claim did not contain the quantity of land described in the patent because it did not include the strip of land in dispute, the grantor paid, and plaintiff accepted, three hundred dollars in satisfaction of the deficiency and breach of warranty. Held, that adverse possession was not shown.—*Kanne v. Otty*, 531.

II. CRIMINAL EVIDENCE.

16. **FALSE PRETENSES—VARIANCE.**—A note for eighty dollars, bearing indorsements showing the payment of forty-three dollars, is admissible in evidence on a trial for obtaining money under false pretenses, where the indictment alleges that the defendant falsely represented that a certain written and printed paper, with certain writing thereon signed by the defendant, was a valid promissory note for the payment of thirty-seven dollars, and it is shown that the defendant represented that the sum of thirty-seven dollars was due

CRIMINAL EVIDENCE—CONCLUDED.

thereon, and that he indorsed on its back a guaranty of its payment, since the indictment charges that the note was valid for the payment of thirty-seven dollars, and not that the note itself was for that amount.—*State v. Bloodworth, 84.*

17. **INSANITY AS A DEFENSE TO MURDER**—CODE, § 706—EVIDENCE OF SUBSEQUENT CONDUCT.—On the defense of insanity superinduced by alcoholism, the sheriff's testimony that on the day after the homicide accused had no symptoms of delirium tremens, is admissible, in the trial court's discretion, even if the sheriff be not so intimate an acquaintance as to make his opinion, with reason given, competent, under Hill's Code, § 706, since it is within the discretion of the trial court to admit evidence of the acts, conduct, and habits of the accused at such subsequent time as would fairly justify any inference of insanity relating back to the time of the alleged offense.—*State v. Hansen, 891.*
18. **WITNESSES—CONTRADICTORY STATEMENTS.**—Accused having, before consulting counsel, formally confessed that he struck his wife the fatal blow after she had quarreled with and thrown a rock at him, and a witness having sworn that accused told him that he struck the blow without provocation, on a sudden impulse, which he could not explain, there was no error in admitting testimony that such statement was made after accused had consulted with his counsel, there having been no effort made to argue that the defense of insanity was devised by counsel at such visit, or to show what occurred at the visit at all.—*State v. Hansen, 891.*
19. **EVIDENCE TO CORROBORATE CONFESSION.**—On a trial for murder of defendant's wife, evidence tending to prove that deceased kept her money in the bureau drawer and carried the key in her pocket; that, when the body was discovered the key was not there, but was found in the bureau drawer; that defendant just before the alleged homicide had no money; and that when the sheriff arrested him the next day after the homicide there was found upon his person over fifty dollars, is admissible to show his connection with the commission of the crime, the motive for its perpetration, and as tending to corroborate a confession made by him that he took the key from her pocket and opened the bureau drawer.—*State v. Hansen, 891.*

EXECUTION SALES.

1. **DISCRETION OF SHERIFF**—CODE, § 292.—A sheriff is vested with an unreviewable discretion as to whether he will sell lots on execution *en masse* or in separate parcels.—*Baye v. Trulson, 110.*
2. **PORTLAND CHARTER OF EIGHTEEN HUNDRED AND EIGHTY-TWO—RETURN ON WARRANT FOR SALE OF PROPERTY.**—Portland City Charter, § 126, which requires a return of the amount for which each lot or part thereof was sold, is mandatory on the officer executing the warrant, and a failure to make such a return renders the sale, and the deed executed in pursuance thereof void.—*Baye v. Trulson, 110.*
3. **INJUNCTION—SALE OF EXEMPT PROPERTY ON EXECUTION.**—A suit by a judgment debtor will not lie to enjoin the sale of his personal property under execution upon the ground that it is exempt by law from sale under judicial process, unless the property possesses a special value to the judgment debtor alone, such as a keepsake, or a memento of some kind, the loss of which cannot be compensated in damages, since the judgment debtor has an adequate remedy at law for the unlawful seizure or detention except as to property possessing such special value.—*Parsons v. Hartman, 547.*

EXEMPT PROPERTY.

Injunction to Prevent Sale of Exempt Property on Execution. See INJUNCTION, 7.

EXTRAS IN PUBLIC WORK.

PUBLIC IMPROVEMENTS—EXTRAS AND INCIDENTALS.—In the absence of a provision in the ordinance authorizing a public improvement, or a general provision in the city charter, extras or incidentals incurred in making such improvement cannot be charged against the property benefited.—*Smith v. City of Portland*, 297.

EXPERT TESTIMONY.

EXPERT TESTIMONY.—The question as to whether the lowering of heavy tiles from a flat-car to the ground by rolling them down skids with a rope placed around them and snubbed to a post or stake was a safe method of unloading the tiles, is not a proper subject of expert testimony, the work not requiring any special skill or knowledge.—*Nutt v. Southern Pacific Co.* 291.

FALSE PRETENSES.

1. **FALSE PRETENSES—VARIANCE.**—A note for eighty dollars, bearing indorsements showing the payment of forty-three dollars, is admissible in evidence on a trial for obtaining money under false pretenses, where the indictment alleges that the defendant falsely represented that a certain written and printed paper, with certain writing thereon signed by the defendant, was a valid promissory note for the payment of thirty-seven dollars, and it is shown that the defendant represented that the sum of thirty-seven dollars was due thereon, and that he indorsed on its back a guaranty of its payment, since the indictment charges that the note was valid for the payment of thirty-seven dollars, and not that the note itself was for that amount.—*State v. Bloodworth*, 84.
2. **INDICTMENT—FALSE PRETENSES—CODE, § 1777.**—An indictment under section 1777 of Hill's Code, for obtaining money by false pretenses, is sufficient in charging that defendant did obtain the money by means of certain specified false representations, without alleging that the person defrauded relied upon such representations.—*State v. Bloodworth*, 83.

FEES of Talesmen when summoned as Jurors. See **TALESMEN.**

FIDUCIARY RELATION.

Between Principal and Agent. See **PRINCIPAL AND AGENT**, 1, 2.

Between Corporation and its Officers. See **CORPORATIONS**, 3.

FINDINGS OF FACT.

TRIAL BY THE COURT—FINDINGS OF FACT ON MATERIAL ISSUES.—The law is well settled in Oregon that in an action tried by the court without the intervention of a jury, findings must be made on all the material issues.—*Jameson v. Coldwell*, 199.

FIXTURES.

1. **MECHANICS' LIENS—FIXTURES.**—Mechanics and material-men are not entitled to liens for material or work unless the same has become part of the building or structure; no lien attaches for mere fixtures which are removable.—*Pulterson v. Gallagher*, 227.
2. **MECHANICS' LIEN—DERRICK—FIXTURE.**—A derrick erected by a tenant in a quarry, by placing a post upright in a socket upon the ground, with guy ropes extending from its top to stakes set in the ground, is a trade fixture, and not subject to a lien.—*Honeyman v. Thomas*, 539.

FORCIBLE ENTRY AND DETAINER.

LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER—CODE, § 2987.—Under section 2987 of Hill's Code, providing that in a lease at will notice to quit is given in time if it equals the intervals between the payments of rent, a complaint in forcible detainer is good which alleges a tendency at will, and

FORCIBLE ENTRY AND DETAINER—CONCLUDED.

twenty days' notice to quit, since it may be that the rent was payable at periods of less than twenty days.—*Forrythe v. Pogue*, 481.

FOREIGN JUDGMENT.

PLEADING FOREIGN JUDGMENT.—A complaint in an action on a foreign judgment, alleging that plaintiff recovered a judgment against defendant in the superior court of another state, no part of which has been paid; that the same remains in force and effect; that on motion of defendant the judgment was vacated, annulled, and set aside by such court; that by writ of *certiorari* the entire proceedings were removed to the supreme court, where a judgment against defendant and in favor of plaintiff was rendered adjudging that the order of the superior court vacating the judgment be set aside, and that plaintiff recover her costs; but failing to allege any remittitur from the supreme court to the superior court, does not state a cause of action.—*Cougill v. Farmers' Insurance Co.* 360.

FORFEITURE of Real Estate Contract for default in Payment. See **VENDOR AND PURCHASER**, 1.

FRAUD AND FRAUDULENT CONVEYANCES.

1. **FRAUDULENT MORTGAGE.**—A mortgage designed and made for the benefit of the mortgagor, and to enable him to continue in business by placing his property beyond the reach of legal process, is void as to creditors, although it may be intended in good faith for the ultimate benefit of all the creditors by preventing a sacrifice of the property.—*Sabin v. Columbia Fuel Co.* 15.
2. **IDEM—MORTGAGE FOR FUTURE ADVANCES.**—A person or corporation in the conduct of its business may mortgage its property to secure future as well as present advances; and a provision in a mortgage for securing future advances, not stipulating that the mortgagor may continue in business, or obligating the mortgagee to make any additional advances, does not render the mortgage void as against creditors, although the mortgagor was in fact unable to pay all his debts when the security was given.—*Sabin v. Columbia Fuel Co.* 15.
3. **FRAUD—BURDEN OF PROOF.**—There is an essential difference between the material fact of fraud, and the circumstances tending to prove it; while some of the circumstances surrounding the making of a mortgage may point to the conclusion that it was intended to hinder and delay creditors, yet if they are explainable consistently with honesty and good faith, the mortgage ought to be sustained, and the burden of proving the fraud always rests on the plaintiff.—*Sabin v. Columbia Fuel Co.* 15.
4. **FRAUDULENT CONVEYANCE—PARTICIPATION OF MORTGAGOR.**—The fact that a mortgagor may have intended to delay other creditors by giving a mortgage will not affect the validity of the instrument unless the mortgagee also participated in the fraudulent intent.—*Sabin v. Columbia Fuel Co.* 15.
5. **FRAUD—CANCELLING DEED—FIDUCIARY RELATION OF PRINCIPAL AND AGENT.**—A trustee or agent is bound to entire truthfulness and good faith toward his principal, and if by false representations he induces the latter to sell him property for less than its value, the conveyance will be set aside in equity.—*Shute v. Johnson*, 59.
6. **IDEM.**—Where plaintiff listed his land with defendant, a real estate agent, for exchange, and, relying on defendant's representation that certain land of his was worth as much as plaintiff's, exchanged his land therefor, his deed to defendant will be canceled where defendant grossly misrepresented the value of his land; since plaintiff has a right to rely on defendant's representations because of the fiduciary relations existing between them.—*Shute v. Johnson*, 59.

FRAUD AND FRAUDULENT CONVEYANCES—CONCLUDED.

7. **CHATTEL MORTGAGE—PRESUMPTION OF FRAUD—CHANGE OF POSSESSION—**CODE, § 776, SUBDIVISION 40.—The change of possession of mortgaged chattels necessary to rebut the presumption of fraud raised by subdivision 40 of section 776 of Hill's Code, when the mortgage has not been filed or recorded, must be actual as distinguished from constructive or legal, and it must be accompanied by such outward acts of ownership as will indicate to the public that the property has changed hands. The possession of the mortgagee should also be exclusive, and not jointly or concurrently with that of the mortgagor.—*Pierce v. Kelly*, 95.
8. **CHATTEL MORTGAGE—EVIDENCE OF FRAUD.**—Where an employé of a person operating a store takes a mortgage on the goods, which is not recorded, the fact that he thereafter purchases other goods without disclosing the fact that he claimed possession of the goods in the store under his mortgage, does not necessarily raise a presumption of fraud if he paid for them; but, if the purchase is made through a prior employé of the mortgagor, without notice to the seller of the change in his employment, it tends to show that there was no such change in the possession of the goods in the store.—*Pierce v. Kelly*, 96.
9. **PRIORITIES BETWEEN CHATTEL MORTGAGES.**—Where chattel mortgages are made in good faith and for a valuable consideration, and possession is not delivered, their priority is determined by the time of their execution, and not by the time of their filing, since by subdivision 40 of section 776, Hill's Code, there is only a rebuttable presumption of fraud against an unrecorded mortgage, which does not exist when the mortgage is either admitted or proven to be *bona fide*.—*Davis v. Bowman*, 189.
10. **FRAUDULENT CONVEYANCES.—PARTICIPATION OF GRANTEE IN THE FRAUD—**CODE, § 3053.—Chattel mortgages given to secure *bona fide* debts are not void on the ground that they are given to hinder and delay creditors, although executed by the debtor for that purpose, where the grantee accepts them simply for the purpose of securing his claim, without any connivance with the debtor, although he may be aware that they will necessarily hinder and delay creditors, and that the debtor executed them with that object in view. It is only when the mortgage is both given and received with the intent to hinder and defraud creditors that it is void.—*Currie v. Bowman*, 365.
11. **CHATTEL MORTGAGES ON STOCKS OF GOODS.**—Chattel mortgages on goods constituting stock are valid although permitting the mortgagor to remain in possession where they require him to keep a strict account and pay over the proceeds less the expenses of the business, to the mortgagee, and the conduct of the mortgagee indicates that he intends the terms of the mortgages shall be observed.—*Currie v. Bowman*, 365.
12. **MUNICIPAL CORPORATIONS—INJUNCTION—FRAUD.**—Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers.—*Avery v. Job*, 512.

FUTURE ADVANCES.

MORTGAGE FOR FUTURE ADVANCES.—A person or corporation in the conduct of its business may mortgage its property to secure future as well as present advances, and a provision in a mortgage for securing future advances, not stipulating that the mortgagor may continue in business, or obligating the mortgagee to make any additional advances, does not render the mortgage void as against creditors, although the mortgagor was in fact unable to pay all his debts when the security was given.—*Sabin v. Columbia Fuel Co.* 15.

GENERAL APPEARANCE.

When Appearance is General and when Special. See SPECIAL APPEARANCE.

HARMLESS ERROR.

CHATTEL MORTGAGE—NOTICE TO CREDITORS OF MORTGAGOR—HARMLESS ERROR.—An instruction that a chattel mortgage is not good as against creditors who have no notice of its existence, unless placed on file, is erroneous under the Oregon statute as it existed prior to the legislative session of eighteen hundred and ninety-three, but it is harmless where the record shows that the creditor had notice of the execution of the mortgage, and the jury are expressly instructed that a mortgage is good as to such a creditor although not filed.—*Pierce v. Kelly*, 96.

HIGHWAYS.

Material taken by Supervisors to repair Roads. See ROAD SUPERVISORS.

HOMICIDE.

Deliberation and Premeditation—Excitement. See CRIMINAL LAW, 4, 5.
Self-defense. See CRIMINAL LAW, 6.
Reasonable Doubt. See CRIMINAL LAW, 7.
Corroborative Evidence of Confession. See CRIMINAL EVIDENCE, 5.
Corroborative Evidence of Deliberation. See CRIMINAL LAW, 11.

ILLEGAL CONTRACT.

Pleading Illegality of Contract—Illegal Contracts not Enforced on Grounds of Public Policy. See CONTRACTS.

IMPLIED AUTHORITY OF AGENT.

POWER OF AGENTS TO BIND CORPORATIONS—IMPLIED AUTHORITY OF AGENTS.—The old rule that a corporation could only appoint an agent under its corporate seal is now obsolete, and it is settled that, in the absence of some restrictions, a corporation may by parol confer upon an agent authority to perform any act which the corporation may lawfully do; and in some cases this authority will be implied.—*Calvert v. Idaho Stage Co.* 412.

IMPLIED COVENANTS IN LEASE.

REPAIRS.—In the absence of a covenant to repair, it is the duty of the tenant, under the implied covenants of the lease, to so use the property as to avoid the necessity for repairs.—*Fleischer v. Citizens' Investment Co.* 119.

INDICTMENT.

1. **INDICTMENT—FALSE PRETENSES—CODE, § 1777.**—An indictment under section 1777 of Hill's Code, for obtaining money by false pretenses, is sufficient in charging that defendant did obtain the money by means of certain specified false representations, without alleging that the person defrauded relied upon such representations.—*State v. Bloodsworth*, 83.
2. **PRACTICE IN CRIMINAL CASES—MOTION TO DISMISS—DEMURRER—CODE, §§ 1322, 1330.**—An objection that an indictment for obtaining money under false pretenses does not sufficiently describe the false token, must be made by demurrer, and cannot be raised for the first time at the trial by a motion to dismiss.—*State v. Bloodsworth*, 84.
3. **WAREHOUSE RECEIPTS—INDICTMENT UNDER SECTIONS 4201 AND 4207, HILL'S CODE.**—Section 4201, Hill's Code, makes it "the duty of every person owning, controlling, managing, or operating a warehouse or other place where grain * * * or other product or commodity is stored," to deliver a receipt correctly stating the quantity received, and section 4207 provides a penalty for violating section 4201. An indictment charged that the defendant was

INDICTMENT—CONCLUDED.

engaged in keeping, controlling, operating, and managing as owner, a warehouse, and was doing business as a warehouseman, and alleged that, being such warehouseman, he feloniously and unlawfully issued and delivered to the owner of certain pelts a receipt for a greater number of sheepskins than he had in store. *Held*, that the indictment was defective because it could not be determined therefrom whether the warehouse in question was one of those mentioned in the statute, and this notwithstanding it appears on the face of the indictment that the defendant kept, managed, and operated the warehouse in which the sheepskins in question were stored.—*State v. Kosland*, 178.

4. BAIL BOND—DISMISSING INDICTMENT.—When a defendant has been admitted to bail after being indicted, a resubmission of the matter to the grand jury, unless, perhaps, to remedy a mere formal defect, without defendant's consent, or upon a motion or demurrer of defendant under sections 1317 and 1323, Hill's Code, releases the sureties on the bond.—*Hyde v. Cross*, 543.

INDORSER OF NEGOTIABLE PAPER.

1. BILLS AND NOTES—INDORSEMENT BEFORE DELIVERY.—Third persons who indorse notes before delivery are original promisors, and as the form of the note is joint or several, so will be their liability.—*Wade v. Creighton*, 455.
2. *IDEM*.—Under the established rule in Oregon a third party who indorses a note at the time of its execution and before delivery is *prima facie* a second indorser, the presumption being that he did not expect to incur any liability until the payee had indorsed; but where such an indorsement is made to give the maker credit with the payee, and the indorser waives protest, demand, and notice of nonpayment, he will be considered as a first indorser, and may be sued as such.—*Wade v. Creighton*, 455.

INCUMBRANCES.

1. COVENANT AGAINST INCUMBRANCES KNOWN TO GRANTEE.—The fact that an incumbrance not excepted from the operation of a covenant was known to the grantee is no defense to an action for breach of such covenant.—*Corbett v. Wrenn*, 305.
2. BREACH OF COVENANT—MITIGATION OF DAMAGES.—In an action for breach of covenant against incumbrances, evidence for defendant that plaintiff paid off an outstanding incumbrance complained of before maturity, else he would not have had to pay more than he was allowed therefor on the purchase price, is inadmissible to defeat the action, as the covenant is in fact broken, although it might be allowed in mitigation of damages.—*Corbett v. Wrenn*, 305.
3. BREACH OF COVENANT AGAINST INCUMBRANCES.—A covenant against incumbrances is broken so as to entitle the grantee to at least nominal damages, if at its date there was an outstanding incumbrance on the property not excepted from the operation of the covenant, and where the grantee pays off an incumbrance not excepted from the covenant, the amount so paid may be recovered from the grantor, less whatever the grantee may have agreed to pay for that purpose.—*Corbett v. Wrenn*, 305.

INJUNCTION.

1. INJUNCTION—NUISANCE—EQUITY.—A court of equity will restrain the continuance of a nuisance when the complaint will sustain some irreparable injury, or be compelled to resort to a multiplicity of actions for damages; but this general rule is subject to this limitation, that the complainant must allege and prove that he has sustained some private, direct damage other than that suffered by the public at large.—*Essex v. Watter*, 7.
2. INJUNCTION TO RESTRAIN ERECTION OF DAM—OVERFLOW OF WATERS.—The construction of a dam will not be enjoined on the ground that it will cause

INJUNCTION—CONCLUDED.

the water to overflow the banks of the river and flood plaintiff's land, unless it is shown that in consequence of the existence of the dam, lands belonging to plaintiff will be submerged which would not otherwise be.—*Eason v. Wattier*, 7.

3. INJUNCTION—NUISANCE.—To justify a court of equity in interfering by injunction to state a nuisance, the nuisance must be an actual existing offense, and not merely apprehended.—*Eason v. Wattier*, 7.
4. ROAD SUPERVISORS—TAKING MATERIAL—INJUNCTION—CODE, § 4092.—A road supervisor, acting in good faith, cannot be enjoined from taking soil and gravel from neighboring lands for the repair of his roads, as Hill's Code, § 4092, confides the matter to his judgment, and the owner's rights are protected by his opportunity to claim damages in the county court.—*Cherry v. Matheuse*, 484.
5. MUNICIPAL CORPORATIONS—LIABILITY ON BONDS—INJUNCTION.—It is a general rule that when the legislature authorizes a municipality to contract a debt, and issue bonds therefor, it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference, and, although a special tax or fund may be provided, the bondholder's remedy is not limited to such a tax or fund, unless it is provided that the bonds shall not be paid in any other way. The bonds, when issued, become a debt of the municipality for which it is primarily liable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of the general fund. In such cases property owners who are taxed for general municipal purposes may enjoin the improper issuance of the bonds, as their burden of taxation will be affected.—*Avery v. Job*, 512.
6. MUNICIPAL CORPORATIONS—INJUNCTION—FRAUD.—Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers.—*Avery v. Job*, 512.
7. INJUNCTION—SALE OF EXEMPT PROPERTY ON EXECUTION.—A suit by a judgment debtor will not lie to enjoin the sale of his personal property under execution upon the ground that it is exempt by law from sale under judicial process, unless the property possesses a special value to the judgment debtor alone, such as a keepsake, or a memento of some kind, the loss of which cannot be compensated in damages, since the judgment debtor has an adequate remedy at law for the unlawful seizure or detention except as to property possessing such special value.—*Parsons v. Hartman*, 547.

INJURY TO EMPLOYEE. See MASTER and SERVANT.

INSANITY.

1. INSANITY AS A DEFENSE TO MURDER—CODE, § 706—EVIDENCE OF SUBSEQUENT CONDUCT.—On the defense of insanity superinduced by alcoholism, the sheriff's testimony that on the day after the homicide accused had no symptoms of delirium tremens, is admissible, in the trial court's discretion, even if the sheriff be not so intimate an acquaintance as to make his opinion, with reason given, competent, under Hill's Code, § 706, since it is within the discretion of the trial court to admit evidence of the acts, conduct, and habits of the accused at such subsequent time as would fairly justify any inference of insanity relating back to the time of the alleged offense.—*State v. Hansen*, 391.

INSANITY — CONCLUDED.

2. **INSANITY AS A DEFENSE TO CRIME**—CODE, § 1262.—Under Hill's Code, § 1262, requiring insanity, as a defense, to be proved beyond a reasonable doubt, the jury's finding on that question cannot be disturbed.—*State v. Hansen*, 302.
3. **IDEM.**—Where a defense is insanity, the burden of proof always remains with the defendant: Code, § 1262.—*State v. Hansen*, 302.

INSOLVENTS AND INSOLVENCY.

1. **INSOLVENCY DEFINED—PREFERENCES BY CORPORATIONS.**—The term "insolvency," as used in bankrupt and insolvency proceedings, denotes the inability of a party to pay his debts as they become due in the ordinary course of business, but for general purposes the popular meaning of the word is preferable, viz., the insufficiency of the entire property of an individual or corporation to pay his or its debts.—*Sabin v. Columbia Fuel Co.* 15.
2. **PREFERENCES BY INSOLVENT CORPORATION.**—A corporation engaged in the business for which it was organized, although embarrassed and unable to pay its debts at maturity, is not necessarily insolvent so as to forbid preference of one creditor over another.—*Sabin v. Columbia Fuel Co.* 16.
3. **ASSETS OF INSOLVENT CORPORATION AS A TRUST FUND.**—The doctrine that the entire property of an insolvent corporation constitutes a trust fund which must be administered by the directors for the proportionate benefit of all creditors, without preference, can apply, if at all, only when that point is reached in the affairs of the corporation where its managers find themselves obliged to deal with its assets in view of a suspension, but not while the corporation is in good faith engaged in its usual business, although it may in fact be insolvent.—*Sabin v. Columbia Fuel Co.* 16.

INSTRUCTIONS TO JUDGES.

ASSAULT WITH INTENT TO RAPE—INSTRUCTION—INVADING PROVINCE OF JURY.

On trial for assault with intent to rape, the court did not invade the province of the jury in charging that, "if the evidence establish the facts which usually accompany and precede the crime of rape when fully consummated, then if such facts and circumstances have not been explained, and the assault is made out, it is fair to presume that the assault was accompanied with the intent."—*State v. Chalmers*, 221.

2. **SEDUCTION—DAMAGES.**—While a jury may consider seduction in estimating damages for a breach of a promise to marry, they are not obliged to do so, and it is error to instruct the jury that they "must" so consider it.—*Cassius v. Winters*, 260.
3. **HOMICIDE—DELIBERATION AND PREMEDITATION.**—An instruction on a trial for murder, that the time occupied by defendant in going from one specified place to another was sufficient to afford him opportunity for deliberation and premeditation, is not erroneous where the evidence shows that the defendant's mind was in its normal state, and that nothing had occurred prior to the killing to arouse his passion.—*State v. Morey*, 241.
4. **MURDER—INSTRUCTION ON DELIBERATION AND PREMEDITATION.**—To constitute murder in the first degree, it is not necessary that the deliberate intent to kill should have been formed for any specific length of time prior to the commission of the act, but it is enough that it existed at the moment of the killing, provided that it was formed when the mind was in its normal state, under the control of the slayer, and not in the heat of passion; and ordinarily the question of whether there was deliberation will be left to the jury under all the circumstances of the case. Where, however, the conceded fact is that the defendant was not in any degree whatever excited or disturbed, and there was no question of cooling time in the case, the court may properly instruct the jury that the time required to walk from the street into the first

INSTRUCTIONS TO JUDGES—CONCLUDED.

story of a building was sufficient to afford opportunity for deliberation and premeditation.—*State v. Morey*, 241.

5. **INSTRUCTION TO JURIES—ASSUMING EXISTENCE OF FACTS.**—Where there is any conflict in the evidence concerning the existence of any fact, the court ought not, in its instructions, to assume that such fact is or is not established; but when the uncontradicted evidence of the fact is clear and convincing, or when the fact is admitted, the court may properly assume that such fact is true, and frame the instructions accordingly.—*State v. Morey*, 241.
6. **INJURY TO SERVANT—MISLEADING INSTRUCTION.**—In an action by a section hand against a railroad company for personal injuries, an instruction that the jury, in assessing damages, might consider, *inter alia*, plaintiff's "condition and station in life," was misleading, as it might mean either his physical condition and occupation, or his social and pecuniary position.—*Nutt v. S. Pacific Co.* 292.
7. **INSTRUCTIONS TO JURY—PRACTICE.**—A party to an action who has given evidence tending to sustain the issues on his part is entitled to have the jury instructed on his theory of the case.—*Flore v. Ladd*, 423.
8. **ENTIRE INSTRUCTIONS.**—The rule is the same in criminal as in civil cases, that instructions must be considered in their entirety, and a single instruction that might be subject to criticism, when not misleading, will not justify a reversal, if properly limited by correct instructions.—*State v. Hansen*, 392.

INTENT is the test of criminal responsibility, regardless of the motive or purpose.
State v. Hansen, 392.

INTOXICATION.

INTENT AS A TEST OF CRIMINAL LIABILITY—INTOXICATION.—HILL'S CODE, § 1358, —Where the existence of a particular motive, purpose, or intent is necessary to constitute a particular species or degree of crime, and intoxication is an element of the defense, (Hill's Code, § 1358,) the intent is the test of criminal liability, regardless of the motive or purpose.—*State v. Hansen*, 392.

IRRIGATION.

1. **IRRIGATION—RIGHT TO INCREASE APPROPRIATION.**—A prior appropriator of water is entitled to a sufficient quantity to irrigate his land, and he may increase the appropriation to keep pace with the additional area brought under cultivation, if it is done with reasonable diligence; but where he fails for a number of years to increase the cultivated area, he cannot then increase the appropriation to the injury of appropriators whose rights have accrued in the mean time.—*Low v. Risor*, 551.
2. **IRRIGATION—HOW THE RIGHT OF APPROPRIATION IS DETERMINED.**—The right of appropriation is determined by the use made of the water, and not by the amount diverted onto the land, and will be limited to the amount used within a reasonable time for some useful industry.—*Low v. Risor*, 551.
3. **WATERS—PAROL LICENSE—REVOCATION.**—A parol license to divert a certain quantity of water for irrigating purposes is not revocable by the licensor after the licensee has expended his money and labor in digging a ditch and preparing his land for the use of the water upon the faith of such parol license; and the grantee of the riparian owner having notice of such license takes subject to it.—*McBroom v. Thompson*, 559.
4. **ESTOPPEL—IRRIGATION—PERMITTING IMPROVEMENTS TO BE MADE WITHOUT OBJECTION.**—Where, for a series of years, riparian owners and their grantors have acquiesced in the diversion of a part of a stream by a person who is not a riparian owner, and such person has yearly aided in keeping the channel of the stream open, and expended money on his farm, which would be worth-

IRRIGATION — CONCLUDED.

less without the water, a court of equity will not enjoin a further diversion of the water at the suit of such riparian owners. — *McBroom v. Thompson*, 589.

JUDGMENT.

PLEADING FOREIGN JUDGMENT.—A complaint in an action on a foreign judgment, alleging that plaintiff recovered a judgment against defendant in the superior court of another state, no part of which has been paid; that the same remains in force and effect; that on motion of defendant the judgment was vacated, annulled, and set aside by such court; that by writ of *certiorari* the entire proceedings were removed to the supreme court where a judgment against defendant and in favor of plaintiff was rendered adjudging that the order of the superior court vacating the judgment be set aside, and that plaintiff recover her costs; but failing to allege any remittitur from the supreme court to the superior court, does not state a cause of action. — *Cougill v. Farmers' Insurance Co.* 360.

JURISDICTION.

1. **GENERAL AND SPECIAL APPEARANCE — JURISDICTION.**—When a defendant appears in an action or proceeding asking some relief which can be granted only on the hypothesis that the court has jurisdiction, the appearance is general, whether it be by its terms so limited or not; but if granting the relief asked would be consistent with a want of jurisdiction, the appearance may be special without submitting to the jurisdiction for any other purpose. — *Belknap v. Charlton*, 41.
2. **SPECIAL APPEARANCE — ATTACHMENT — JURISDICTION.**—An appearance in an attachment proceeding by defendants who have not been served with process, moving only to discharge the attachment because the action had been commenced in the wrong county, is a special and not a general appearance, and does not constitute a waiver of process. — *Belknap v. Charlton*, 41.
3. **SPECIAL APPEARANCE — JURISDICTION.**—In Oregon there is no special provision for dismissing a suit or action because the summons has not been served, and a proper manner of raising the question of lack of jurisdiction not appearing on the face of the complaint is by a special appearance. — *Belknap v. Charlton*, 41.
4. **JURISDICTION OF EQUITY TO REFORM WRITTEN CONTRACTS.**—To justify a court of equity in reforming a written contract, it should clearly appear that there was some relation of trust or confidence between the parties that has been abused, or that there was fraud, or fraud on one side accompanied by mistake on the other, or that the means of knowing the facts were not equally open to both parties. — *Kleinsorge v. Rohse*, 51.
5. **ADMIRALTY — CONSTITUTIONAL LAW — JURISDICTION OF STATE COURTS TO ENFORCE MARITIME LIENS — CODE, § 3690.**—State courts have no jurisdiction to enforce by proceedings *in rem* liens for supplies furnished to a vessel in her home port, since such contracts are maritime, and the district courts of the United States have exclusive jurisdiction thereof under the Revised Statutes of the United States, § 563, clause 8, and § 711, clause 3, which are a reenactment of the ninth section of the Judiciary Act of 1789. — *The Willapa*, 71.
6. **IDEM.**—State legislatures may create liens on vessels for supplies or demands, as has been done by section 3690 of Hill's Code, and may also provide for their enforcement by proceedings *in rem*; but whenever the liens so created arise out of maritime contracts, the parties must seek their remedy in the federal courts, to which exclusive jurisdiction in admiralty and maritime case has been confided by the constitution of the United States, article III., § 2. State legislatures have power to create maritime liens, but not to provide for their enforcement. — *The Willapa*, 71.

JURISDICTION—CONCLUDED.

7. NUISANCE—JURISDICTION OF EQUITY—CODE, §§ 333, 380.—The remedy provided by section 333 of Hill's Code, in cases of nuisance, is not exclusive, and does not limit the remedy for nuisances to actions at law; whenever a nuisance will cause an irreparable injury, or numerous damage actions will be required, equity has "concurrent jurisdiction with courts of law" within the meaning of section 380, Hill's Code, and will enjoin the continuance of the objectionable conditions.—*Fleischner v. Citizens' Investment Co.* 119.
9. JURISDICTION—PRESUMPTION.—In case of an appeal on a jurisdictional question, the court will not presume that there was any proof beyond what appears in the record.—*Moffitt v. McGrath*, 478.

JUROR'S FEES.

JUROR'S FEES—TALESMAN—CODE, § 2348.—A talesman summoned on a special venire from the body of the county acts as a juror within the meaning of section 2348, Hill's Code, and is entitled to his fees, if he attends court in obedience to the process, though he does not serve on the jury; it is otherwise with a talesman summoned from the bystanders.—*Bloch v. Multnomah County*, 169.

JURY TRIAL. See INSTRUCTIONS TO JURY.

1. EQUITY—JURY TRIAL—CONSTITUTION, ARTICLE I., § 17.—A court of equity which has gained jurisdiction of a suit to restrain a private nuisance may render judgment for damages as an incident to the suit for injunction, notwithstanding section 17 of article I. of the state constitution, providing that "in all civil cases the right of trial by jury shall remain inviolate." These words continued to all suitors the right of trial by jury in all cases where it was secured to them by the laws or practices of the courts at the time of the adoption of the constitution, but were not intended to abridge the equity jurisdiction then existing. As equity had jurisdiction to restrain nuisances prior to the adoption of the constitution, the jurisdiction still continues, and the matter of damages is only an incident.—*Fleischner v. Citizens' Investment Co.* 119.
2. INSTRUCTIONS TO JURIES—ASSUMING EXISTENCE OF FACTS.—Where there is any conflict in the evidence concerning the existence of any fact, the court ought not, in its instructions, to assume that such fact is or is not established; but when the uncontradicted evidence of the fact is clear and convincing, or when the fact is admitted, the court may properly assume that such fact is true, and frame the instructions accordingly.—*State v. Morey*, 241.
3. ENTIRE INSTRUCTIONS.—The rule is the same in criminal as in civil cases, that instructions must be considered in their entirety, and a single instruction that might be subject to criticism, when not misleading, will not justify a reversal, if properly limited by correct instructions.—*State v. Hansen*, 392.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—RESPONSIBILITY FOR NUISANCE—IMPLIED COVENANTS OF LEASE.—A landlord out of possession is not responsible for a nuisance originating after the execution of the lease, unless he is in some manner at fault for its creation or continuance. In the absence of a covenant to repair it is the duty of the tenant, under the implied covenants of the lease, to so use the property as to avoid the necessity for repairs, and if the property was in good condition when demised, and leased for a purpose that would not create a nuisance, the landlord is not liable for the creation or maintenance of a nuisance on the leased premises.—*Fleischner v. Citizens Investment Co.* 119.
2. LANDLORD AND TENANT—LEASE—RENEWAL.—A lease for a given period with the privilege of extending for an additional term is, if the privilege is accepted, a lease for the entire time; the additional term is not a new demise, but a continuation of the old one.—*Fleischner v. Citizens Investment Co.* 119.

LANDLORD AND TENANT—CONCLUDED.

3. NUISANCE—LANDLORD AND TENANT.—A landlord who renews a lease after the creation of a nuisance upon the premises thereby becomes chargeable for its continuance.— *Fleischner v. Citizens Investment Co.* 119.
4. TROVER BY TENANT AGAINST LANDLORD.—Where, during the term of a lease, the landlord enters and takes possession of the premises, and converts to his own use removable trade fixtures erected by the tenant for use in his business, the tenant may bring trover against the landlord unless he has surrendered the premises and abandoned the term.— *Roseman v. Syring*, 286.
5. LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER—CODE, § 2987.—Under section 2987 of Hill's Code, providing that in a lease at will notice to quit is given in time if it equals the intervals between the payments of rent, a complaint in forcible detainer is good which alleges a tenancy at will, and twenty days' notice to quit, since it may be that the rent was payable at periods of less than twenty days.— *Forsythe v. Pogue*, 481.

LEASE.

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LIENS.

- Boat Liens. See ADMIRALTY.
 Mechanics' Liens. See MECHANICS' LIENS.
 Mining Liens. See MINES, 1, 2.
 Railroad Liens. See RAILROADS, 4.

LIMITATION OF ACTIONS. See STATUTE OF LIMITATIONS, 1.

LITHOGRAPHIC MAP as Evidence of Dedication. See DEDICATION, 3.

LOCAL IMPROVEMENTS.

- Assessment of Property not Benefited — Due Process of Law. See MUNICIPAL CORPORATION, 4.
 Assessment of Property for Extras or Incidentals not included in the Contract. See CONTRACTS, 11.

LUMP CHARGE.

MECHANIC'S LIENS—LUMP CHARGE.—An account containing a lump charge, in which are mingled lienable and nonlienable items unsegregated, will not support a lien; nor in such cases can the defect be cured by oral evidence, separating the two classes of items.— *Williams v. Toledo Coal Co.* 425.

MANDATE.

PRACTICE IN SUPREME COURT—MANDATE.—The mere fact that a party against whom a judgment for costs has been entered in the supreme court is insolvent, is not ground for withholding the mandate.— *Corman v. Winters*, 290.

Maps or Plats as Evidence of Dedication. See DEDICATION, 2.

MARITIME LIENS.

States may Create but Cannot Enforce Maritime Liens. See ADMIRALTY, 1, 2

MASTER AND SERVANT.

1. DUTY OF MASTER TO PROVIDE SAFE AND SUITABLE APPLIANCES FOR THE USE OF SERVANTS.—An employer is not a guarantor that the tools or appliances provided for the use of employes are absolutely safe, or free from all defects; he is only under obligation to use reasonable diligence and care in so providing.—*Nutt v. Southern Pacific Co.* 291.
2. IDEM.—It is sufficient if an employer furnishes his employes with reasonably safe and suitable appliances, and he need not furnish appliances of a particular kind.—*Nutt v. Southern Pacific Co.* 291.
3. INJURY TO SERVANT—MISLEADING INSTRUCTION.—In an action by a section hand against a railroad company for personal injuries, an instruction that the jury, in assessing damages, might consider, *inter alia*, plaintiff's "condition and station in life," was misleading, as it might mean either his physical condition and occupation, or his social and pecuniary position.—*Nutt v. Southern Pacific Co.* 292.

MECHANICS' LIENS.

1. NOTICE OF MECHANICS' LIEN—CODE, § 3673.—The notice of lien mentioned in section 3673 of Hill's Code, must not only show, either directly or by necessary inference, to whom the material or labor was furnished, but also that the claimant did in fact do something.—*Dillon v. Hart*, 49.
2. NOTICE OF LIEN—CODE, § 3673.—A notice of lien in the following language, viz: "Know all men by these presents, that I, H. E. * * * have, by virtue of a contract heretofore made with partners, * * * who were the contractors and agents of J. D. and C. C., and J. D. and C. C. were the owners and principals in the building and furnishing the material of a certain house, the ground upon which said house was built and material furnished being at the time the property of J. D. and C. C. who caused the said house to be built and material furnished," is insufficient to sustain a lien under section 3673 of Hill's Code, because it does not show to whom the material was furnished, or that any material was furnished at all.—*Dillon v. Hart*, 49.
3. MECHANICS' LIENS—FIXTURES.—Mechanics and material men are not entitled to liens for material or work unless the same has become part of the building or structure; no lien attaches for mere fixtures which are removable.—*Patterson v. Gallagher*, 227.
4. MINES AND MINING—LIENS—LAWS, 1891, P. 76.—The lien given on mining claims by the act of February twentieth, eighteen hundred and ninety-one, (Laws, 1891, p. 76,) applies to claims on which minerals have not, as well as to those on which minerals have, been found.—*Williams v. Toledo Coal Co.* 426.
5. MECHANIC'S LIEN—MINES.—The lien given by the act of eighteen hundred and ninety-one, (Laws, 1891, p. 76, § 1,) for work performed in making shafts, drifts, etc., on a mining claim, or in searching for metals therein, does not include labor performed in building a wagon road, not constituting an incline or an excavation, since, when liens are given for specified classes of work, all other classes are impliedly excluded.—*Williams v. Toledo Coal Co.* 426.
6. MECHANICS' LIENS—LUMP CHARGE.—An account containing a lump charge, in which are mingled lienable and nonlienable items unsegregated, will not support a lien; nor in such cases can the defect be cured by oral evidence separating the two classes of items.—*Williams v. Toledo Coal Co.* 426.
7. MECHANIC'S LIEN—DERRICK—FIXTURE.—A derrick erected by a tenant in a quarry by placing a post upright in a socket upon the ground with guy ropes

MECHANICS' LIENS—CONCLUDED.

extending from its top to stakes set in the ground, is a trade fixture and not subject to a lien.—*Honeyman v. Thomas*, 539.

MINES AND MINING.

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MINOR.

PARENT AND CHILD—DEATH BY WRONGFUL ACT—CODE, § 34.—The word "child," as used in section 34, Hill's Code, providing that "a father, or in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the death or injury of a child," means a minor child.—*Craft v. Northern Pacific Railroad Co.* 275.

MISLEADING Instruction to Jury. See INSTRUCTION TO JURY.

MORTGAGES.

1. FRAUDULENT MORTGAGE.—A mortgage designed and made for the benefit of the mortgagor, and to enable him to continue in business by placing his property beyond the reach of legal process, is void as to creditors, although it may be intended in good faith for the ultimate benefit of all the creditors by preventing sacrifice of the property.—*Sabin v. Columbia Fuel Co.* 15.
2. IDEM—MORTGAGE FOR FUTURE ADVANCES.—A person or corporation in the conduct of its business may mortgage its property to secure future as well as present advances; and a provision in a mortgage for pecuniary future advances, not stipulating that the mortgagor may continue in business, or obligating the mortgagee to make any additional advances, does not render the mortgage void as against creditors, although the mortgagor was in fact unable to pay all his debts when the security was given.—*Sabin v. Columbia Fuel Co.* 15.
3. FRAUDULENT CONVEYANCE—PARTICIPATION OF MORTGAGEE.—The fact that a mortgagor may have intended to delay other creditors by giving a mortgage will not affect the validity of the instrument unless the mortgagee also participated in the fraudulent intent.—*Sabin v. Columbia Fuel Co.* 15.
4. PREFERENCE OF CREDITORS BY CORPORATION.—So long as a corporation is a "going concern," engaged in the conduct of its regular business, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities, it is not in such a state of insolvency as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, even though the debt is one for which the directors are security.—*Sabin v. Columbia Fuel Co.* 15.
5. CORPORATIONS—AUTHORITY OF PRESIDENT TO EXECUTE MORTGAGE—RATIFICATION BY DIRECTORS.—The general agent of a corporation is not authorized to mortgage its property as security for a loan, without specific authority from its board of directors, but acquiescence by the board in unauthorized chattel mortgages executed by the president is presumed, where ordinary care and attention to the business would have revealed the fact of their execution, and where, after the mortgagee had taken possession of the goods under the mortgages, the board, with full knowledge of the president's act, took no steps to

MORTGAGES—CONCLUDED.

disaffirm his authority or to repudiate the mortgages until the lapse of several months.—*Curtle v. Bouman*, 364.

MOTION TO DISMISS is not the proper way to raise the objection that a false token is not sufficiently described in the indictment; the objection should be made by demurrer before trial.—*State v. Bloodworth*, 88.

MUNICIPAL CORPORATIONS.

1. **SALE OF PROPERTY FOR DELINQUENT STREET IMPROVEMENTS UNDER SECTIONS 106, 107, AND 126 OF PORTLAND CITY CHARTER OF 1882.**—Section 292 of Hill's Code, gives a sheriff an unreviewable discretion as to whether he will sell lots on execution *en masse* or in separate parcels, and this rule is apparently incorporated into the Portland city charter of eighteen hundred and eighty-two, so far as concerns the sale of lots for delinquent street improvements, including sewers, by section 107 thereof, which provides that a warrant for such improvements shall have the force and effect of an execution against real property, except as otherwise provided, but the terms of sections 106 and 126 of the charter, which require the officer to whom a warrant for a delinquent street improvement is addressed to levy on the lot or part thereof upon which the assessment is unpaid, and to specify in his return the amount for which each lot or part thereof sold, show that the procedure on such sales has been otherwise provided for, and that sales for delinquent street improvements must be made in separate lots.—*Bays v. Trulson*, 110.
2. **PORTLAND CHARTER OF EIGHTEEN HUNDRED AND EIGHTY-TWO—RETURN ON WARRANT FOR SALE OF PROPERTY.**—Portland City Charter, § 126, which requires a return of the amount for which each lot or part thereof was sold, is mandatory on the officer executing the warrant, and a failure to make such a return renders the sale and the deed executed in pursuance thereof void.—*Bays v. Trulson*, 110.
3. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—DISCRETION OF COUNCIL—INJUNCTION.**—Where the measure of assessments for street improvements in a city is limited to the amount of benefits derived, and the common council is invested with a discretion in determining that amount (East Portland Charter, [Laws, 1885, pp. 316, 320], article VI., §§ 5, 18), the courts will not review the determination of the council, so long as its discretion is honestly exercised and not abused.—*Oregon & California Railroad Co. v. City of Portland*, 229.
4. **LOCAL IMPROVEMENTS—ASSESSMENT ON PROPERTY NOT BENEFITED—DUE PROCESS OF LAW.**—The enforcement of an assessment for local improvements upon property not at all benefited thereby is the taking of property without due process of law.—*Oregon & California Railroad Co. v. City of Portland*, 229.
5. **MUNICIPAL CORPORATIONS.**—City ordinances approved and signed by the president of the city council acting in place of the mayor, who has resigned, are a nullity, under a charter which authorizes such president to act in the place of the mayor, and perform his duties in case of the latter's temporary absence or disability, but confers no such right to act when the office is vacant.—*Babbidge v. City of Astoria*, 417.
6. **MUNICIPAL CORPORATIONS—INJUNCTION—FRAUD.**—Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers.—*Avery v. Job*, 512.
7. **MUNICIPAL CORPORATIONS—LIABILITY ON BONDS—INJUNCTION.**—It is a general rule that when the legislature authorizes a municipality to contract a

MUNICIPAL CORPORATIONS—CONCLUDED.

debt, and issue bonds therefor, it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference, and, although a special tax or fund may be provided, the bondholder's remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way. The bonds, when issued, become a debt of the municipality for which it is primarily reliable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of the general fund. In such cases property owners who are taxed for general municipal purposes may enjoin the improper issuance of the bonds, as their burden of taxation will be affected.— *Avery v. Job*, 512.

NEGLIGENCE.

1. **RAILWAYS—NEGLIGENCE—SPEED OF TRAINS.**—Running a railroad train faster than is permissible under an ordinance which merely prescribes a penalty for violating its provisions is not negligence *per se*; but is a circumstance proper to be submitted to the jury with the other evidence in the case.— *Beck v. Vancouver Railway Co.* 32.
2. **CARRIERS—RUNAWAY HORSES—PRESUMPTION OF NEGLIGENCE.**—In an action for injuries to a passenger against a carrier operating coaches, evidence that the horses ran and kicked, and that the driver lost all control over them raises a presumption that defendant, in disregard of its duty, provided wild and unsafe horses and a careless and incompetent driver.— *Budd v. United Carriage Co.* 314.
3. **RAILROAD COMPANIES—NEGLIGENCE—TRESPASSERS ON TRACK.**—The mere fact that persons have frequently trespassed upon a railroad track, and that the company has resorted to no means to stop such trespassers, does not amount to a permission or license to use the track as a footpath.— *Ward v. Southern Pacific Co.* 433.
4. **IDEM.**—The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck.— *Ward v. Southern Pacific Co.* 433.

See also CONTRIBUTORY NEGLIGENCE.

NEGOTIABILITY of Warehouse Receipts. See WAREHOUSE RECEIPTS, 2.

NOTICE.

Actual Notice of Existence of Chattel Mortgage is Equivalent to Record Notice. See CHATTEL MORTGAGES, 7.

Notice of Mechanics' Lien. See MECHANICS' LIEN.

Notice to Quit. See LANDLORD AND TENANT, 5.

NOTICE OF APPEAL.

1. **NOTICE OF APPEAL—BILL OF EXCEPTIONS—CODE, § 587.**—Much greater care is necessary in specifying errors in a notice of appeal where there is a bill of exceptions than where the appeal rests entirely upon the record, since the respondent is presumed to take notice of matters of record, but would not be chargeable with knowledge of a decision upon matters not in writing.— *Bridg's Vell Lumbering Co. v. Johnson*, 105.
2. **SERVICE OF NOTICE OF APPEAL.**—A written acknowledgment of the service of a notice of appeal by one of the parties is insufficient to authorize the court to assume jurisdiction without proof of the authenticity of the signature.— *Mogill v. McGrath*, 478.

NOTICE OF APPEAL—CONCLUDED.

3. **SERVICE OF NOTICE OF APPEAL.**—The notice of appeal required by section 537 of Hill's Code should be served on the attorney of the respondent, if such attorney reside in the county where the case is pending: Code, § 531.—*Wheeler v. Cragin*, 602.
4. **SERVICE OF NOTICE OF APPEAL BY ATTORNEY.**—The notice of appeal required by section 537 of Hill's Code may be served by the appellant's attorney under the terms of Hill's Code, § 527.—*Wheeler v. Cragin*, 602.

NUISANCE.

1. **INJUNCTION—NUISANCE—EQUITY.**—A court of equity will restrain the continuance of a nuisance when the complainant will sustain some irreparable injury, or be compelled to resort to a multiplicity of actions for damages; but this general rule is subject to this limitation, that the complainant must allege and prove that he has sustained some private, direct damage other than that suffered by the public at large.—*Eason v. Wattler*, 7.
2. **INJUNCTION—NUISANCE.**—To justify a court of equity in interfering by injunction to abate a nuisance, the nuisance must be an actual existing offense, and not merely apprehended.—*Eason v. Wattler*, 7.
3. **LANDLORD AND TENANT—RESPONSIBILITY FOR NUISANCE—IMPLIED COVENANTS OF LEASE.**—A landlord out of possession is not responsible for a nuisance originating after the execution of the lease, unless he is in some manner at fault for its creation or continuance. In the absence of a covenant to repair it is the duty of the tenant, under the implied covenants of the lease, to so use the property as to avoid the necessity for repairs, and if the property was in good condition when demised, and leased for a purpose that would not create a nuisance, the landlord is not liable for the creation or maintenance of a nuisance on the leased premises.—*Fleischer v. Citizens' Investment Co.* 119.
4. **NUISANCE—LANDLORD AND TENANT.**—A landlord who renews a lease after the creation of a nuisance upon the premises thereby becomes chargeable for its continuance.—*Fleischer v. Citizens' Investment Co.* 119.
5. **NUISANCE—JURISDICTION OF EQUITY—CODE, §§ 333, 330.**—The remedy provided by section 333 of Hill's Code, in cases of nuisance, is not exclusive, and does not limit the remedy for nuisances to actions at law; whenever a nuisance will cause an irreparable injury, or numerous damage actions will be required, equity has "concurrent jurisdiction with courts of law" within the meaning of section 330, Hill's Code, and will enjoin the continuance of the objectionable conditions.—*Fleischer v. Citizens' Investment Co.* 119.
6. **RIGHT TO JURY TRIAL.**—A court which has gained jurisdiction of a suit to restrain a private nuisance may award damages as an incident to the injunction. Section 17 of article I. of the State Constitution was not intended to abridge the equity jurisdiction then existing, and as equity had jurisdiction to restrain nuisances prior to the adoption of the constitution it still continues, the damages being only incidental to the main issue.—*Fleischer v. Citizens' Investment Co.* 119.

OBTAINING MONEY BY FALSE PRETENSES.

Indictment—Evidence—Variance. See FALSE PRETENSES.

ORDINANCES.

- MUNICIPAL CORPORATIONS.**—City ordinances approved and signed by the president of the city council acting in place of the mayor, who has resigned, are a nullity, under a charter which authorizes such president to act in the place of the mayor, and perform his duties in case of the latter's temporary absence or disability, but confers no such right to act when the office is vacant.—*Babbidge v. City of Astoria*, 417.

PARENT AND CHILD.

PARENT AND CHILD—DEATH BY WRONGFUL ACT—CODE, § 84.—The word "child," as used in section 84, Hill's Code, providing that a "father, or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the death or injury of a child," means a minor child.—*Craft v. Northern Pacific R.R. Co.* 275.

PAROL EVIDENCE.

To Contradict Record required by Law. See EVIDENCE, 2.

To Contradict Record not required by Law. See EVIDENCE, 2.

To explain Latent Ambiguity in Grant. See EVIDENCE, 14.

PARTNERSHIP.

1. **CORPORATION—PARTNERSHIP—CO-OWNERSHIP.**—A corporation may become a co-owner with an individual in a business or enterprise within the scope of its corporate powers, although it cannot as a general rule enter into partnership with an individual.—*Calvert v. Idaho Stage Co.* 412.

2. **PARTNERSHIP—PLEADING.**—Where an action on an implied contract for goods furnished by a firm is brought in the name of the partners, and it is alleged that they jointly furnished the goods, it is not necessary to allege the partnership.—*Clark v. Wick*, 446.

PAYMENT.

1. **PROMISSORY NOTES—WHAT CONSTITUTES PAYMENT.**—A stipulation in a promissory note that it is "to be paid only when payment becomes and is actually made" on a certain other designated note, does not require payment of the other note in money to make the former one due, for payment, though usually understood to mean a satisfaction in money, may be made in something else if the parties so agree.—*Bush v. Abraham*, 336.

2. **PROMISSORY NOTE—SUBSTITUTED PAYMENT—RESCISSION OF SALE.**—Defendant sold lands, receiving some cash, and notes for the balance, secured by mortgage on the lands. Thereafter the vendee became insolvent, and in consideration of a reconveyance of the property, and an order on a third person for a certain sum, and to save the expense of foreclosure, the vendor discharged the mortgage, and canceled the notes. Held, a substituted payment of such notes, and not a rescission of the sale.—*Bush v. Abraham*, 336.

3. **PAYMENT—GENERAL DENIAL.**—Under a general denial no proof of payment can be received.—*Clark v. Wick*, 446.

PLAT or Map as Evidence of Dedication—Knowledge of Grantor. See DEDICATION, 2.

PLEA IN ABATEMENT may be united with an answer to the merits in condemnation proceedings under section 3263, Hill's Code, which constitutes an exception to the general rule of pleading in this state.—*Bridal Veil Lumbering Co. v. Johnson*, 105.

PLEADING.

1. **ILLEGAL CONTRACT—PLEADING—PROOF—PUBLIC POLICY.**—It is an established rule of pleading that the illegality of a contract sued on must be pleaded in order to be available as a defense; but if it should appear from the testimony of plaintiff's witnesses that the contract in question is illegal or immoral, the court ought to dismiss the proceeding of its own motion on grounds of public policy, even though no such defense has been pleaded.—*Ah Doon v. Smith*, 89.

2. **EMINENT DOMAIN—PLEA IN ABATEMENT—CODE, § 3263.**—Under the provisions of section 3263 of Hill's Code, a landowner, in an action to condemn a right of way across his property, may unite in his answer any legal defenses with a claim for damages; and under this rule a denial of corporate existence

PLEADING—CONTINUED.

- need not be set forth as a plea in abatement in such cases.—*Bridal Veil Lumbering Co. v. Johnson*, 105.
3. PLEADING ESTOPPEL.—The rule is well settled that an estoppel by deed or record must be pleaded to be available either as a cause of action or as a defense.—*Bays v. Trulson*, 109.
 4. PLEADING—ASSUMPSIT—DUPLICITY.—A complaint alleging that plaintiff on specified dates "loaned defendant money, furnished him goods, wares, and merchandise, and paid out money at his request" to a designated amount, and that defendant agreed and promised to pay plaintiff therefor.—states but one cause of action. It is not duplicitous, for it states only the facts connected with the one promise which is the basis of the action.—*Hough v. Hough*, 218.
 5. PLEADING—ACTIONS SOUNDING IN CONTRACT OR TORT—CODE, §§ 67 AND 98.—A complaint which alleges that defendant sold certain land to plaintiff with a representation and a covenant that there were no incumbrances thereon except a mortgage for a specified amount; that said representation was false, and was so known to be by the defendant when made; and that plaintiff purchased in reliance on said representation; and was subsequently compelled to pay a much larger sum to release said mortgage, is open to a motion to strike out, under section 85 of Hill's Code, or to a demurrer for misjoinder of causes of action, under sections 67 and 98, since the allegations sound in both tort and contract; but in the absence of such pleadings it is properly treated as an action for breach of covenant.—*Corbett v. Wrenn*, 303.
 6. SUIT TO REFORM A DEED—PLEADING.—In a suit to reform a written instrument, the complaint should show the original agreement of the parties, should point out clearly wherein the writing differs from the agreement, and that such difference was caused by fraud or mutual mistake, and did not arise from the gross negligence of the plaintiff; but in the absence of a demurrer the complaint will be held sufficient if it alleges that to make the writing conform to the actual intention of the parties it should be amended in certain specified particulars.—*Osborn v. Ketchum*, 352.
 7. PLEADING FOREIGN JUDGMENT.—A complaint in an action on a foreign judgment, alleging that plaintiff recovered a judgment against defendant in the superior court of another state, no part of which has been paid; that the same remains in force and effect; that on motion of defendant the judgment was vacated, annulled, and set aside by such court; that by writ of *certiorari* the entire proceedings were removed to the supreme court, where a judgment against defendant and in favor of plaintiff was rendered adjudging that the order of the superior court vacating the judgment be set aside, and that plaintiff recover her costs; but failing to allege any remittitur from the supreme court to the superior court, does not state a cause of action.—*Cougill v. Farmers' Insurance Co.* 360.
 8. TROVER—DEMAND BEFORE SUIT—PLEADING TITLE IN DEFENDANT.—Where defendant denies plaintiff's title, and pleads ownership and right to the possession in himself or another, he cannot defeat recovery on the ground that plaintiff did not allege and prove demand before suit.—*Roseman v. Syring*, 386.
 9. PARTNERSHIP—PLEADING.—Where an action on an implied contract for goods furnished by a firm is brought in the name of the partners, and it is alleged that they jointly furnished the goods, it is not necessary to allege the partnership.—*Clark v. Wick*, 446.
 10. PAYMENT—GENERAL DENIAL.—Under a general denial no proof of payment can be received.—*Clark v. Wick*, 446.
 11. AMENDMENT TO CONFORM PLEADINGS TO FACTS PROVED.—Where evidence is received without objection as to material matters not set up in the pleadings, a refusal of leave to amend so as to conform the pleadings to the real issue tried is reversible error.—*Cook v. Croisan*, 473.

PLEADING—CONCLUDED.

12. LANDLORD AND TENANT—FORCEFUL ENTRY AND DETAINER—CODE, § 2987.—Under section 2987 of Hill's Code, providing that in a lease at will notice to quit is given in time if it equals the intervals between the payments of rent, a complaint in forcible detainer is good which alleges a tenancy at will, and twenty days' notice to quit, since it may be that the rent was payable at periods of less than twenty days.—*Forsythe v. Pogue*, 481.
13. PLEADING—REPLY—COUNTERCLAIM.—In an action for work and labor done, in which a counterclaim for different items is set up, a reply alleging that the amounts of the items are less than that set forth in the counterclaim, and have been fully paid, without asking any affirmative relief, is not inconsistent with the complaint.—*Van Bibber v. Fields*, 527.

PORTLAND CHARTER.

Charter of 1882, Sections 106, 107, 126. See MUNICIPAL CORPORATIONS.

PRACTICE IN CIVIL CASES.

Cross Examination—Limits and Character. See CROSS EXAMINATION.
 Errors by Referee—Bill of Exceptions. See REFEREE'S REPORT.
 Harmless Errors. See INSTRUCTIONS TO JURY.
 Instructions Must be Taken in their Entirety. See INSTRUCTIONS TO JURY, 8.
 Plea in Abatement—Condemnation Cases. See PLEADING, 2.
 Referee's Report no Part of Transcript. See TRANSCRIPT.

PRACTICE IN CRIMINAL CASES.

MOTION TO DISMISS is not proper way to raise point that the false pretenses are not sufficiently described in the indictment. See CRIMINAL LAW, 3.
 ENTIRE INSTRUCTIONS TO JURY must be considered, and not isolated portions. See INSTRUCTIONS TO JURY, 8.

PRACTICE IN PROBATE CASES.

Appointment of Creditor as Administrator. See PROBATE PRACTICE, 1.
 Rejected Claim—Outlawed Note. See PROBATE PRACTICE, 2.

PRACTICE IN SUPREME COURT.

Service of Affidavits. See SUPREME COURT, 1.
 Damages when Appeal is abandoned. See SUPREME COURT, 2.
 Issuing Mandate—Insolvency. See SUPREME COURT, 3.

PREFERENCE BY INSOLVENT CORPORATIONS.

1. PREFERENCE BY INSOLVENT CORPORATION.—A corporation engaged in the business for which it was organized, although embarrassed and unable to pay its debts at maturity, is not necessarily insolvent so as to forbid preference of one creditor over another.—*Sabin v. Columbia Fuel Co.* 16.
2. TRUST FUND.—The trust fund doctrine regarding the assets of insolvent corporations cannot apply while the corporation is in good faith conducting the business for which it has organized, if, indeed, it can apply at all.—*Sabin v. Columbia Fuel Co.* 16.
3. PREFERENCES BY CORPORATIONS.—So long as a corporation carries on its business with the expectation of its continuance, it is not insolvent so as to avoid a preference given to a creditor. *Sabin v. Columbia Fuel Co.* 25 Or. 15, approved and followed.—*Currie v. Bowman*, 365.

PREMEDITATION AND DELIBERATION.

Corroborative Evidence of Premeditation. See CRIMINAL EVIDENCE, 5.
 Time required to form Intention. See CRIMINAL LAW, 4, 5.

PRESUMPTION.

1. **CHATTEL MORTGAGE—PRESUMPTION OF FRAUD—CHANGE OF POSSESSION—**CODE, § 776, SUBDIVISION 40.—The change of possession of mortgaged chattels necessary to rebut the presumption of fraud raised by subdivision 40 of section 776 of Hill's Code, when the mortgage has not been filed or recorded, must be actual as distinguished from constructive or legal, and it must be accompanied by such outward acts of ownership as will indicate to the public that the property has changed hands. The possession of the mortgagee should also be exclusive, and not jointly or concurrently with that of the mortgagor.—*Pierce v. Kelly*, 96.
2. **CARRIERS—RUNAWAY HORSES—PRESUMPTION OF NEGLIGENCE.**—In an action for injuries to a passenger against a carrier operating coaches, evidence that the horses ran and kicked, and that the driver lost all control over them, raises a presumption that defendant, in disregard of its duty, provided wild and unsafe horses and a careless and incompetent driver.—*Budd v. United Carriage Co.* 314.
3. **JURISDICTION—PRESUMPTION.**—In case of an appeal on a jurisdictional question, the court will not presume that there was any proof beyond what appears in the record.—*Moffitt v. McGrath*, 478.

PRINCIPAL AND AGENT.

1. **FRAUD—CANCELLING DEED—FIDUCIARY RELATION OF PRINCIPAL AND AGENT.**—A trustee or agent is bound to entire truthfulness and good faith toward his principal, and if by false representations he induces the latter to sell him property for less than its value, the conveyance will be set aside in equity.—*Shute v. Johnson*, 59.
2. **IDEM.**—Where plaintiff listed his land with defendant, a real estate agent, for exchange, and, relying on defendant's representation that certain land of his was worth as much as plaintiff's, exchanged his land therefor, his deed to defendant will be canceled where defendant grossly misrepresented the value of his land; since plaintiff has a right to rely on defendant's representations because of the fiduciary relation existing between them.—*Shute v. Johnson*, 59.
3. **PRINCIPAL AND AGENT—RATIFICATION OF CONTRACT—COMMISSIONS.**—Where a corporation has rescinded a contract made in its name by its officers because of a secret commission contracted for by such officers for themselves, the fact that the corporation again purchases the same property for the same price, less the secret commission, is not such a ratification of the original contract as to make the seller liable to the officers for their commission.—*Jameson v. Caldwell*, 200.

PRINCIPAL AND SURETY.

- PRINCIPAL AND SURETY—ORIGINAL UNDERTAKING.**—Where two or more persons execute an instrument at the same time, upon the same consideration, and for the same purpose, they are all, in legal effect, joint contractors, so far as concerns their liability to the other contracting party, although one may be designated therein as "surety," and sign as such. That one of the parties may have executed the instrument as surety is only evidence of the position and relationship of the makers among themselves, and does not affect the joint nature of their obligation or the right to sue them jointly for a breach of the contract.—*Bowen v. Clarke*, 592.

PRIORITIES between Chattel Mortgages. See **CHATTEL MORTGAGES**, 8.

PROBATE PRACTICE.

1. **ESTATES OF DECEDENTS—APPOINTMENT OF CREDITOR AS ADMINISTRATOR.**—A petition by one who alleges himself to be the principal creditor of a decedent's estate, asking for the appointment of petitioner as administrator of the estate

PROBATE PRACTICE—CONCLUDED.

and for the removal of another creditor who has been appointed administrator, is insufficient unless it avers the facts which make him the principal creditor,—a general allegation to that effect is not sufficient.—*Cusick v. Hemmer*, 472.

2. ALLOWANCE OF CLAIM BARRED BY STATUTE.—The presentation of a note, with payments indorsed thereon after the statute of limitations had run, and the testimony of a stranger that decedent once gave him money to deliver to the claimant as a payment "on that note," is insufficient to establish the claim, for it does not identify the note, or show a part payment of an admitted larger debt.—*Harding v. Grim*, 504.

PROMISSORY NOTES. See BILLS AND NOTES.

PUBLIC LANDS.

1. BOUNDARIES—LATENT AMBIGUITY—PUBLIC LANDS—PAROL EVIDENCE.—Where there is an ambiguity in the descriptive words of a grant respecting the quantity, character, or duration of the estate conveyed, evidence of the intention of the parties is admissible to interpret it; and such an ambiguity exists where a boundary line of a government patent was not in fact surveyed on the line there indicated.—*Kanne v. Otty*, 531.
2. PUBLIC LANDS—INTENTION OF PARTIES.—The intention of the parties to a patent to land under section 5 of the act of congress approved September twenty-seventh, eighteen hundred and fifty, providing for granting to settlers one hundred and sixty acres of land, must be ascertained from the actual survey as originally made upon the land; and the description of the premises by courses and distances must yield to visible or ascertained monuments.—*Kanne v. Otty*, 531.

PUBLIC IMPROVEMENTS.

1. THE TERMS OF A BID accepted by a city council must be followed exactly in making the contract; no items can be inserted and the cost of them collected from the property assessed.—*Smith v. City of Portland*, 297.
2. PUBLIC IMPROVEMENTS—EXTRAS AND INCIDENTALS.—In the absence of a provision in the ordinance authorising a public improvement, or a general provision in the city charter, extras or incidentals incurred in making such improvement cannot be charged against the property benefited.—*Smith v. City of Portland*, 297.

PUBLIC POLICY.

ILLEGAL CONTRACT—PLEADING—PROOF—PUBLIC POLICY.—It is an established rule of pleading that the illegality of a contract sued on must be pleaded in order to be available as a defense; but if it should appear from the testimony of plaintiff's witnesses that the contract in question is illegal or immoral, the court ought to dismiss the proceedings of its own motion on grounds of public policy, even though no such defense has been pleaded.—*Al Doon v. Smith*, 89.

PUBLIC RECORDS. See RECORDS.

RAILWAYS.

1. RAILWAYS—CONTRIBUTORY NEGLIGENCE.—A railway track is always a place of danger, and one who ventures to walk upon it must make vigilant use of his eyes and ears, and, upon discovering an approaching train, must leave the track if it is possible to do so; neglect of these precautions is such contributory negligence as will prevent a recovery in case injury results.—*Beck v. Vancouver Railway Co.* 82.
2. IDEM.—If one deliberately, and with his eyes open, goes into danger, he will not be heard to complain because he has been injured; it is his duty to use all the ordinary means that men generally use for their preservation, and if

RAILWAYS—CONCLUDED.

he falls in that regard, if he is apprised of the situation, and chooses a way of danger when a way of safety is open to him, he is guilty of contributory negligence, and must abide the result of his hardihood.—*Beck v. Vancouver Railway Co.* 82.

3. RAILWAYS—NEGLIGENCE—SPEED OF TRAINS.—Running a railroad train faster than is permissible under an ordinance which merely prescribes a penalty for violating its provisions is not negligence *per se*; but is a circumstance proper to be submitted to the jury with the other evidence in the case.—*Beck v. Vancouver Ry. Co.* 82.
4. LIENS ON RAILROADS—PRIORITIES—LAWS, 1889, p. 75.—The lien on railroads given by Laws, 1889, p. 75, attaches only for the amount actually due to the principal contractor from the railroad company at the time the notice is served; previous transfers of or liens upon such fund will take precedence of the notice provided by said act.—*Coleman v. Oregonian R. R. Co.* 286.
5. RAILROAD COMPANIES—NEGLIGENCE—TRESPASSERS ON TRACK.—The mere fact that persons have frequently trespassed upon a railroad track, and that the company have resorted to no means to stop such trespassers, does not amount to a permission or license to use the track as a footpath.—*Ward v. Southern Pacific Co.* 433.
6. *IDEM.*—A railroad company owes to a trespasser upon its track no legal duty to keep a lookout or guard him against danger.—*Ward v. Southern Pacific Co.* 433.
7. *IDEM.*—The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck.—*Ward v. Southern Pacific Co.* 433.

Rape. See ASSAULT.

RATIFICATION.

1. PRINCIPAL AND AGENT—RATIFICATION OF CONTRACT—COMMISSIONS.—Where a corporation has rescinded a contract made in its name by its officers because of a secret commission contracted for by such officers for themselves, the fact that the corporation again purchases the same property for the same price, less the secret commission, is not such a ratification of the original contract as to make the seller liable to the officers for their commission.—*Jameson v. Caldwell*, 200.
2. RATIFICATION OF CONTRACT BY CLAIMING DAMAGES.—Where an agent whose unauthorized contract of purchase has been repudiated by his principal sues the seller for the secret commission promised him, the seller does not by setting up a counterclaim for damages ratify the contract so as to make him liable for the commissions.—*Jameson v. Caldwell*, 200.
3. CORPORATIONS—AUTHORITY OF PRESIDENT TO EXECUTE MORTGAGE—RATIFICATION BY DIRECTORS.—The general agent of a corporation is not authorized to mortgage its property as security for a loan, without specific authority from its board of directors, but acquiescence by the board in unauthorized chattel mortgages executed by the president is presumed, where ordinary care and attention to the business would have revealed the fact of their execution, and where, after the mortgagee had taken possession of the goods under the mortgages, the board, with full knowledge of the president's act, took no steps to disaffirm his authority or to repudiate the mortgages until the lapse of several months.—*Currie v. Bowman*, 364.

REAL ESTATE.

Forfeiture of Contract for Non-payment. See CONTRACTS, 1.
Implied Covenants in Lease. See IMPLIED COVENANTS.

REAL ESTATE—CONCLUDED.

Covenants against Incumbrances. See COVENANTS.

Administrator's Sale to Pay Debts. See ADMINISTRATOR'S SALE.

REASONABLE DOUBT.

1. **REASONABLE DOUBT.**—An instruction that a "reasonable doubt" is such a doubt as a juror can give a reason for is not reversible error, when given in connection with other instructions by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one.—*State v. Morey*, 242.
2. **PROOF OF INSANITY—HOMICIDE—CODE, § 1858.**—Insanity as a defense to crime must be proved beyond a reasonable doubt, the burden of proof on that subject being always with the prisoner, and the finding of the jury will not be disturbed, as that is a question peculiarly within their province to decide.—*State v. Hansen*, 392.

RECEIPTS.

Warehouse Receipts are Negotiable. See WAREHOUSE RECEIPTS, 2.

RECORDS.

PAROL EVIDENCE TO CONTRADICT A RECORD.—The rule is that where a record is not required to be made, but one is kept, it may be explained or supplied by parol testimony, but where a statute requires a record parol testimony cannot be received to contradict or vary the record after it has once been made.—*Boys v. Trulson*, 110.

REFEREE'S REPORT.

REFEREE'S REPORT—TRANSCRIPT.—A referee's report and a motion to set aside a report are not part of the transcript, and any errors by the referee or in his report must be incorporated into the bill of exceptions before they can be reviewed on appeal.—*Van Bibber v. Fields*, 527.

REFORMATION OF WRITTEN INSTRUMENTS.

1. **JURISDICTION OF EQUITY.**—Equity has jurisdiction to reform written instruments so as to make them conform to the real intention of the parties, or to prevent one of the parties from being defrauded, but the facts must be clearly shown.—*Kleinsorge v. Rohse*, 51.
2. **SUIT TO REFORM A DEED—PLEADING.**—In a suit to reform a written instrument the complaint should show the original agreement of the parties, should point out clearly wherein the writing differs from the agreement, and that such difference was caused by fraud or mutual mistake, and did not arise from the gross negligence of the plaintiff, but in the absence of a demurrer the complaint will be held sufficient if it alleges that to make the writing conform to the actual intention of the parties it should be amended in certain specified particulars.—*Osborn v. Ketchum*, 382.
3. **EVIDENCE TO REFORM A DEED.**—Evidence that the parties to a deed to premises conveyed before any survey was made counted the panels in a fence on the east side, and estimated them at one rod to the panel, and allowed two rods to make the line extend to the center of the road, and estimated that the west boundary would intersect the road at a gate near some willows; and that defendant told three witnesses how the length of the east boundary was obtained, and that the west boundary would probably intersect the road near a strawstack, which is shown to be near the willows,—is sufficient to sustain a judgment for the reformation of the deed so as to convey to the center of the road, although the original conveyance was by metes and bounds which left a portion of the land next to the road unconveyed, as shown by a subsequent survey, and the land is still in the hands of the original grantor.—*Osborn v. Ketchum*, 352.

REGULARITY OF TAX PROCEEDINGS. See TAXES AND TAXATION, 1.

REPLY.

PLEADING—REPLY—COUNTERCLAIM.—In an action for work and labor done, in which a counterclaim for different items is set up, a reply alleging that the amounts of the items are less than that set forth in the counterclaim, and have been fully paid, without asking any affirmative relief, is not inconsistent with the complaint.—*Van Bibber v. Fields*, 527.

REPUTATION OF WITNESS for truth and veracity cannot be shown until such reputation has been attacked.—*Oemun v. Winters*, 280.

RESCISSION OF SALE.

PROMISSORY NOTE—SUBSTITUTED PAYMENT—RESCISSION OF SALE.—Defendant sold lands, receiving some cash, and notes for the balance, secured by mortgage on the lands. Thereafter the vendee became insolvent, and in consideration of a reconveyance of the property, and an order on a third person for a certain sum and to save the expense of foreclosure, the vendor discharged the mortgage, and canceled the notes. Held, a substitute payment of such notes, and not a rescission of the sale.—*Bush v. Abraham*, 336.

RESULTING TRUSTS.

1. RESULTING TRUST—STATUTE OF LIMITATIONS.—The statute of limitations does not begin to run against an action to establish a resulting trust in lands until the *cestui que trust* in possession has been ousted.—*Snider v. Johnson*, 323.

2. PAROL EVIDENCE TO ESTABLISH A RESULTING TRUST.—Parol evidence is admissible to establish a resulting trust in land in favor of one paying the purchase price therefor, where another takes the legal title, notwithstanding a recital in the deed that the consideration was paid by the grantee, but the evidence of it must be clear and convincing, and if attended by doubt and uncertainty the writing must remain the highest and best evidence.—*Snider v. Johnson*, 323.

3. EVIDENCE OF RESULTING TRUST.—Where the testimony was conflicting as to whether land was bought with a mother's or her son's money, whether the bond for a deed was taken in her name for herself or to protect his interests as a minor, and whether she directed the deed to be made to him or to her, and the evidence showed that at her request the bond for a deed was never recorded, that the deed was made to the son, and that she delayed over twenty years before she demanded a deed to herself in accordance with his bond, a trust on behalf of the mother is not established.—*Snider v. Johnson*, 323.

RIPARIAN PROPRIETORS.

1. TITLE OF THE STATE TO TIDE AND SUBMERGED LANDS.—On the admission of Oregon into the union the tide lands, and submerged lands lying between the upland and navigable waters in the fresh-water rivers of the state, became its property, and subject to its jurisdiction and disposal; and the state has the right to use or dispose of its title in any manner it may choose, free from any easement of the upland owners therein, except such as the state may choose to allow them, and subject always to the paramount right of navigation, and the uses of commerce.—*Lewis v. City of Portland*, 134.

2. RIGHTS OF RIPARIAN PROPRIETORS ON NAVIGABLE STREAMS—SUBMERGED LANDS—WHARF RIGHTS.—In view of the fact that the state has provided for the sale of its tide lands, but has not legislated on the subject of submerged lands lying between the uplands and the navigable waters of the rivers of the state, and that the act of October twenty-first, eighteen hundred and seventy-six (Laws, 1876, p. 70) grants to the upland owners the tide or overflowed land adjacent to such upland on the Coos, Coquille, and Willamette Rivers, and in view of the further fact that the custom has always prevailed in this state, and without legislative interference, for the upland owner to wharf out in front of his property to navigable water, and in view of the tendency of

RIPARIAN PROPRIETORS—CONCLUDED.

the decisions of the courts as shown in *Minto v. Delaney*, 7 Or. 337, and *Parker v. Rogers*, 8 Or. 190, to recognize in riparian owners on the navigable rivers rights in submerged lands that do not belong to the public generally, the court feels justified in holding that riparian proprietors on the navigable rivers of the state who have built wharves out to navigable water in front of their upland have rights of private property therein that cannot be taken for public use except after due compensation being made thereafter in the manner established by law.—*Lewis v. City of Portland*, 134.

3. **RIPARIAN PROPRIETORS—WHARF RIGHTS UNDER SECTION 4227, HILL'S CODE—CONSTITUTIONAL LAW.**—The object of section 4227, Hill's Code, which authorizes the owners of land lying upon navigable streams, and within the limits of incorporated cities to construct wharves thereon, and extend them out to navigable water, being to encourage the building of wharves in aid of navigation and commerce, riparian owners on navigable streams, who, before the passage of the section, had built wharves on such upland, acquired, within the spirit and intent of said section, property in such wharves which cannot be taken for public use without just compensation.—*Lewis v. City of Portland*, 136.
4. **VESTED RIGHTS IN WHARVES ON NAVIGABLE STREAMS—CONSTITUTIONAL LAW.**—Riparian owners who have built wharves out to the navigable waters of fresh-water streams, with the implied license and permission of the state, and within the spirit and intent of section 4227, Hill's Code, giving to upland proprietors on navigable streams, and within the limits of any incorporated city, the right to build wharves in front of their holdings out to navigable water, have acquired vested rights in such properties that cannot be taken for public use without compensation.—*Lewis v. City of Portland*, 136.

ROAD SUPERVISORS.

1. **EMINENT DOMAIN—TAKING ROAD MATERIAL—DUE PROCESS OF LAW—HILL'S CODE, §§ 4092, 4093.**—Section 4092, Hill's Code, authorizing road supervisors to summarily take materials needed for the public roads, and section 4093, providing that a party aggrieved in such cases may apply to the county court and have his damages assessed, are not unconstitutional as taking property without due process of law; for under section 13 of article I. of the state constitution, compensation need not be made before taking property for the use of the commonwealth, and the provisions of section 4093 afford abundant opportunity for a hearing on the question of damages. In such cases the county court, composed of the supervisors and the county judge, acts judicially, and must be deemed an impartial tribunal.—*Branson v. Gee*, 462.
2. **ROAD SUPERVISORS—TAKING MATERIAL—INJUNCTION—CODE, § 4092.**—A road supervisor, acting in good faith, cannot be enjoined from taking soil and gravel from neighboring lands for the repair of his roads, as Hill's Code, § 4092, confides the matter to his judgment, and the owner's rights are protected by his opportunity to claim damages in the county court.—*Cherry v. Matthews*, 484.
3. **CONSTITUTIONAL LAW—HIGHWAYS—TAKING MATERIAL FROM LAND.**—Hill's Code, §§ 4092, 4093, authorizing road supervisors to take material for a road from land in their district, and providing for the assessment of damages thereafter by the county court, is constitutional, as the State Constitution, article I., § 13, provides that prepayment need not be made for property taken by the state for public use.—*Cherry v. Lane Co.* 487.
4. **DAMAGES FOR PROPERTY TAKEN TO REPAIR ROADS—COUNTY COURT.**—Where a road supervisor enters upon land under the statute, and takes material for a road, an action for damages will not lie against the county for trespass, the sole remedy being by application to the county court to assess the damages, and the action of such court is final.—*Kendall v. Post*, 8 Or. 144, approved and followed.—*Cherry v. Lane Co.* 487.

ROADS TAXES.

1. HIGHWAYS—ROAD TAXES—RIGHTS BETWEEN CITY AND COUNTY.—Under 2 Hill's Code, § 4061, *et seq.*, providing for levying and collecting road taxes and for working the public roads by the county, and section 36 of the charter of the city of Salem, providing that the jurisdiction of the county court upon such subject shall not extend to the city of Salem, and that the street commissioners of such city shall have the power to enforce the payment of such taxes levied within its limits, and shall work them upon its streets, the city is entitled to such taxes levied upon the citizens within its limits.—*City of Salem v. Marion Co.* 449.
2. IDEM.—Where a sheriff collects taxes belonging to the city and collectible by its officers, and pays the same into the county treasury, the city may sue the county to recover the same.—*City of Salem v. Marion Co.* 449.

RUNAWAY HORSES.

1. CARRIERS—PRESUMPTION OF NEGLIGENCE.—Evidence that horses drawing a carriage ran and kicked, and that the driver lost control over them, raises a presumption that the carrier, in disregard of its duty, provided wild and unsafe horses and an incompetent driver.—*Budd v. United Carriage Co.* 814.
2. CARRIERS—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—Where a passenger in a carriage is placed in imminent peril by the running away of the horses, and the driver calls on her to jump out, the question whether she is guilty of contributory negligence in so doing is for the jury.—*Budd v. United Carriage Co.* 814.
3. IDEM.—A carrier cannot escape liability for an injury caused by driving a team over an unsafe road by showing that the injured passenger directed him to drive over such road.—*Budd v. United Carriage Co.* 814.

SALE. See RESCISSION OF SALE.

SEDUCTION.

1. SEDUCTION UNDER PROMISE OF MARRIAGE—CODE, § 1868.—Where a woman yields her virtue to a man, relying upon his promise to marry her in case she becomes pregnant from the act, she is not seduced "under promise of marriage." These words contemplate that the seduction must be accomplished by means of an absolute promise of marriage, or one that becomes absolute the moment the woman yields.—*State v. Adams*, 172.
2. BREACH OF PROMISE—SEDUCTION AS AN ELEMENT OF DAMAGES—CODE, § 36.—In actions for breach of promise, seduction under the promise may be shown in aggravation of damages, notwithstanding section 36, Hill's Code, which gives to an unmarried woman over twenty-one years of age a right of action for her own seduction.—*Osmun v. Winters*, 260.
3. IDEM.—While a jury may consider seduction in estimating damages for a breach of promise to marry, they are not obliged to do so, and an instruction that the jury "must" so consider it, is prejudicial error.—*Osmun v. Winters*, 260.

SELF-DEFENSE.

1. HOMICIDE—SELF-DEFENSE.—The right of self-defense does not depend wholly upon the belief which the person claiming it entertained, but whether or not there was ground for a reasonable belief on his part that he was in danger of death or great bodily harm.—*State v. Morey*, 241.
2. HOMICIDE—CHARACTER OF DECEASED.—If there is testimony tending to show that the defendant was assailed by the deceased and was in apparent danger, the jury may consider that the deceased was turbulent, violent, and desperate, in determining whether defendant had reasonable cause to apprehend great personal injury; but unless the defendant was, or believed himself to be, in imminent danger of death or great bodily harm, the bad character of the deceased is immaterial, since it is as great a crime to kill a bad man as a good one.—*State v. Morey*, 241.

SERVICE OF AFFIDAVITS. See **AFFIDAVITS**, 1.

SERVICE of Notice of Appeal. See **NOTICE OF APPEAL**, 3.

SPECIAL APPEARANCE.

1. **GENERAL AND SPECIAL APPEARANCE—CODE.** §§ 62, 530.—The "voluntary appearance" mentioned in section 62 of Hill's Code is not limited or defined by the terms of section 530 of the Code; the only purpose of this latter section is to define what shall constitute such an appearance as will enable a defendant to be heard as a matter of right, and to have served on him all papers required by law to be served.—*Belknap v. Charlton*, 41.
2. **GENERAL AND SPECIAL APPEARANCE—JURISDICTION.**—When a defendant appears in an action or proceeding asking some relief which can be granted only on the hypothesis that the court has jurisdiction, the appearance is general, whether it be by its terms so limited or not; but if granting the relief asked would be consistent with a want of jurisdiction, the appearance may be special without submitting to the jurisdiction for any other purpose.—*Belknap v. Charlton*, 41.
3. **SPECIAL APPEARANCE—ATTACHMENT—JURISDICTION.**—An appearance in an attachment proceeding by defendants who have not been served with process, moving only to discharge the attachment because the action had been commenced in the wrong county, is a special and not a general appearance, and does not constitute a waiver of process.—*Belknap v. Charlton*, 41.
4. **SPECIAL APPEARANCE—JURISDICTION.**—In Oregon there is no special provision for dismissing a suit or action because the summons has not been served, and a proper manner of raising the question of lack of jurisdiction not appearing on the face of the complaint is by a special appearance.—*Belknap v. Charlton*, 41.

SPEED OF TRAINS.

RAILWAYS—NEGLIGENCE—SPEED OF TRAINS.—Running a railroad train faster than is permissible under an ordinance which merely prescribes a penalty for violating its provisions is not negligence *per se*; but is a circumstance proper to be submitted to the jury with the other evidence in the case.—*Beck v. Vancouver Railway Co.* 32.

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STATUTE OF LIMITATIONS.

1. **RESULTING TRUST—STATUTE OF LIMITATIONS.**—The statute of limitations does not begin to run against an action to establish a resulting trust in lands until the *cestui que trust* in possession has been ousted.—*Snider v. Johnson*, 328.
2. **PROMISSORY NOTE—STATUTE OF LIMITATIONS—EVIDENCE.**—An indorsement of a credit on a promissory note, made after the statute has run against it, is no evidence that the payment representing such credit was made.—*Harding v. Grim*, 506.
3. **ADMINISTRATION—ALLOWANCE OF CLAIM—EVIDENCE.**—Under Hill's Code, § 1184, providing that no claim rejected by an administrator shall be allowed, except upon evidence other than that of the claimant, the production of a note, with payments indorsed thereon after such note was barred by the statute, and the testimony of a stranger that decedent once gave him money to deliver to plaintiff as payment "on that note," does not identify the note, or show part payment of an admitted larger debt, and is insufficient to establish such claim, for in order to give a payment made on a debt against which the statute has run the effect of reviving an obligation, it must clearly appear that it was made and received as part of a larger indebtedness, and under such circumstances as to warrant a jury in finding an implied promise to pay the balance.—*Harding v. Grim*, 506.

STATUTORY CONSTRUCTION.

1. **CONSTITUTIONAL LAW—TITLE OF ACT—CONSTITUTION, ARTICLE IV., § 20.**—The fact that a statute entitled "An act to regulate warehousemen, * * * and to declare the effect of warehouse receipts," and making it a crime to issue warehouse receipts for goods not in store, provides for a penalty for its violation, does not render it obnoxious to the constitutional prohibition against acts embracing subjects not expressed in the title.—*State v. Koshland*, 178.
2. **TAXATION—BOARD OF EQUALIZATION—APPORTIONMENT OF TAXES, ACT OF 1891—CODE, § 2780.**—Under section nine of the act of eighteen hundred and ninety-one, (Laws, 1891, p. 184,) it is the duty of the governor, secretary of state, and state treasurer, to apportion the state tax among the several counties upon the values as equalized by the state board of equalization, and not in the manner prescribed by section 2780, Hill's Code, this latter having been modified by the later law on the same subject.—*State v. Linn County*, 508.
3. **CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION—LAWS, 1891, p. 184—CONSTITUTION, ARTICLE IV., § 20.**—The fact that the act of eighteen hundred and ninety-one (Session Laws, 1891, p. 184), creating the state board of equalization, etc., prescribes certain duties to be performed by the secretary of state and the several county clerks, after the assessment has been equalized by the state board, which are not embraced in its title, does not render so much of the act as undertakes to prescribe such duties obnoxious to Constitution, article IV., § 20, which requires an act to embrace but one subject, "which subject shall be expressed in the title," since these provisions naturally relate to and are connected with the subject matter of the act. *State v. Shaw*, 22 Or. 287, approved and followed.—*State v. Linn County*, 508.

STREET IMPROVEMENTS.

1. **SALE OF PROPERTY FOR DELINQUENT STREET IMPROVEMENTS UNDER SECTIONS 106, 107, AND 126 OF PORTLAND CITY CHARTER OF 1882.**—Section 292 of Hill's Code gives a sheriff an unreviewable discretion as to whether he will sell lots on execution *en masse* or in separate parcels, and this rule is apparently incorporated into the Portland city charter of eighteen hundred and eighty-two, so far as concerns the sale of lots for delinquent street improvements, including sewers, by section 107 thereof, which provides that a warrant for such improvements shall have the force and effect of an execution against real property, except as otherwise provided, but the terms of sections 106 and

STREET IMPROVEMENTS—CONCLUDED.

126 of the charter, which require the officer to whom a warrant for a delinquent street improvement is addressed to levy on the lot or part thereof upon which the assessment is unpaid, and to specify in his return the amount for which each lot or part thereof sold, show that the procedure on such sales has been otherwise provided for, and that sales for delinquent street improvements must be made in separate lots.—*Boys v. Trulson*, 110.

2. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—DISCRETION OF COUNCIL—INJUNCTION.**—Where the measure of assessments for street improvements in a city is limited to the amount of benefits derived, and the common council is invested with a discretion in determining that amount (*East Portland Charter*, [Laws, 1886, pp. 316, 320], article VI., §§ 5, 18), the courts will not review the determination of the council, so long as its discretion is honestly exercised and not abused.—*Oregon & California Railroad Co. v. City of Portland*, 229.
3. **PUBLIC IMPROVEMENTS—ALTERATION OF CONTRACT.**—A committee of a city council, when entering into a contract for the construction of a public improvement with the successful bidder before the council, has no authority to insert in such contract items or terms not in the accepted bid; and the amount of such an item cannot be collected from the property assessed for the improvement.—*Smith v. City of Portland*, 297.

STREETS AND HIGHWAYS.

1. **DEDICATION OF STREET—INTENTION—USER.**—A dedication of land to public use rests entirely on the intent or assent of the owner, and when the evidence of it rests in parol it must be of such a deliberate and decisive character as to leave no doubt of the owner's intention. *Hogue v. Albina*, 20 Or. 135, cited and approved.—*Lewis v. City of Portland*, 133.
2. **EVIDENCE OF DEDICATION BY USER.**—Though a passage way to a wharf was used by the public without objection for over twenty years, such fact does not show a dedication by user, where the owner always claimed to own the way, maintained a gate at the mouth of it part of the time, improved it, and kept it in repair, and exercised general control over it.—*Lewis v. City of Portland*, 133.
3. **MATERIAL FOR THE REPAIR OF HIGHWAYS.**—Under sections 4092, 4093, Hill's Code, road supervisors have an absolute discretion regarding the taking of materials for the repair of the public highways, and the only redress the property owner has is by an appeal to the county court for damages.—*Branson v. Gee*, 462; *Cherry v. Matthews*, 484; *Cherry v. Lane County*, 487.

SUBMERGED LANDS in Navigable Rivers. See **TIDE LANDS**.

SUBSTITUTED PAYMENT. See **PAYMENT**, 1, 2.

SUPERVISORS may take Material to Repair Roads. See **ROAD SUPERVISORS**.

SUPREME COURT.

1. **PRACTICE IN SUPREME COURT—SERVICE OF AFFIDAVITS.**—Affidavits in support of a motion before the supreme court should be filed with the motion, so that the opposite party may have an opportunity to meet them before the hearing.—*Lester v. Elwert*, 102.
2. **ABANDONED APPEAL—DAMAGES.**—Damages will not be allowed to respondent in case of an abandoned appeal where the appellant, before the time for appeal had expired, offered to pay the judgment, and the transcript was filed by respondent.—*Lester v. Elwert*, 102.
3. **PRACTICE IN SUPREME COURT—MANDATE.**—The mere fact that a party against whom a judgment for costs has been entered in the supreme court is insolvent, is not ground for withholding the mandate.—*Cumms v. Winfers*, 280.

SURETY. See **PRINCIPAL AND SURETY**.

SURVEYS.

CONTRACTS—BROKERS.—Under an agreement by a real estate broker to clear certain land, survey and plat it into lots, and advertise and sell it, for a commission of ten dollars upon each lot sold, providing that in case of eviction as the result of a pending action the owner shall pay him a designated sum for clearing the land, after which the contract is to become void, the broker cannot recover the expenses of surveying when the action results in eviction.—*Bartholomew v. Aumack*, 78.

TALESMEN.

JUROR'S FEES—TALESMAN—CODE, § 2348.—A talesman summoned on a special venire from the body of the county acts as a juror within the meaning of section 2348, Hill's Code, and is entitled to his fees, if he attends court in obedience to the process, though he does not serve on the jury; it is otherwise with a talesman summoned from the bystanders.—*Bloch v. Multnomah County*, 109.

TAXES AND TAXATION.

1. **TAX SALES—EVIDENCE OF REGULARITY OF PROCEEDINGS.**—In the absence of a provision making a tax deed *prima facie* evidence of the regularity of the proceedings anterior thereto, the claimant under such a deed must show the regularity and completeness of every step required by the statute in the assessment and collection of the tax.—*Bays v. Trulson*, 109.
2. **PAROL EVIDENCE TO CONTRADICT A RECORD.**—The rule is that where a record is not required to be made, but one is kept, it may be explained or supplied by parol testimony, but where a statute requires a record, as in the case of a sale of property for taxes or street improvements, parol testimony cannot be received to contradict or vary the record after it has once been made; thus, where it appears from the return of an officer on a warrant for the sale of certain lots for an unpaid street assessment that the lots were sold *en masse*, it cannot be shown by parol that the lots were in fact sold singly, since that would be to vary a record which the law required to be made.—*Bays v. Trulson*, 109.
3. **SALE OF PROPERTY FOR DELINQUENT STREET IMPROVEMENTS UNDER SECTIONS 106, 107, AND 126 OF PORTLAND CITY CHARTER OF 1882.**—Section 292 of Hill's Code, gives a sheriff an unreviewable discretion as to whether he will sell lots on execution *en masse* or in separate parcels, and this rule is apparently incorporated into the Portland city charter of eighteen hundred and eighty-two, so far as concerns the sale of lots for delinquent street improvements, including sewers, by section 107 thereof, which provides that a warrant for such improvements shall have the force and effect of an execution against real property, except as otherwise provided, but the terms of sections 106 and 126 of the charter, which require the officer to whom a warrant for a delinquent street improvement is addressed to levy on the lot or part thereof upon which the assessment is unpaid, and to specify in his return the amount for which each lot or part thereof sold, show that the procedure on such sales has been otherwise provided for, and that sales for delinquent street improvements must be made in separate lots.—*Bays v. Trulson*, 110.
4. **PORTLAND CHARTER OF EIGHTEEN HUNDRED AND EIGHTY-TWO—RETURN ON WARRANT FOR SALE OF PROPERTY.**—Portland City Charter, § 126, which requires a return of the amount for which each lot or part thereof was sold, is mandatory on the officer executing the warrant, and a failure to make such a return renders the sale and the deed executed in pursuance thereof void.—*Bays v. Trulson*, 110.
5. **TAXATION—BOARD OF EQUALIZATION—APPORTIONMENT OF TAXES, ACT OF 1891—CODE, § 2780.**—Under section nine of the act of eighteen hundred and ninety-one, (Laws, 1891, p. 184,) it is the duty of the governor, secretary of

TAXES AND TAXATION—CONCLUDED.

state, and state treasurer, to apportion the state tax among the several counties upon the values as equalized by the state board of equalization, and not in the manner prescribed by section 2780, Hill's Code, this latter having been modified by the later law on the same subject.—*State v. Lane County*, 508.

TESTIMONY of a Witness is not only his evidence in chief, but is that evidence as explained, modified, limited, or contradicted by the cross-examination; both the direct and cross-examination must be treated as evidence given on behalf of the party calling the witness.—*AA Doon v. Smith*, 89.

TIDE LANDS.

1. TITLE OF THE STATE TO TIDE AND SUBMERGED LANDS.—On the admission of Oregon into the union the tide lands, and submerged lands lying between the upland and the navigable waters in the fresh-water rivers of the state, became its property, and subject to its jurisdiction and disposal; and the state has the right to use or dispose of its title in any manner it may choose, free from any easement of the upland owners therein except such as the state may choose to allow them, and subject always to the paramount right of navigation, and the uses of commerce.—*Lewis v. City of Portland*, 135.
2. RIGHTS OF RIPARIAN PROPRIETORS ON NAVIGABLE STREAMS—SUBMERGED LANDS—WHARF RIGHTS.—In view of the fact that the state has provided for the sale of its tide lands, but has not legislated on the subject of submerged lands lying between the uplands and the navigable waters of the rivers of the state, and that the act of October twenty-first, eighteen hundred and seventy-six (*Laws*, 1876, p. 70), grants to the upland owners the tide or overflowed land adjacent to such upland on the Coos, Coquille, and Willamette Rivers, and in view of the further fact that the custom has always prevailed in this state, and without legislative interference, for the upland owner to wharf out in front of his property to navigable water, and in view of the tendency of the decisions of the courts as shown in *Minto v. Delaney*, 7 Or. 287, and *Parker v. Rogers*, 8 Or. 190, to recognize in riparian owners on the navigable rivers rights in submerged lands that do not belong to the public generally, the court feels justified in holding that riparian proprietors on the navigable rivers of the state, who have built wharves out to navigable water in front of their upland have rights of private property therein that cannot be taken for public use except after due compensation being made therefor in the manner established by law.—*Lewis v. City of Portland*, 135.

TITLE OF ACT. See STATUTORY CONSTRUCTION.

TRANSCRIPT.

REFEREE'S REPORT—TRANSCRIPT.—A referee's report and a motion to set aside a report are not part of the transcript, and any errors by the referee or in his report must be incorporated into the bill of exceptions before they can be reviewed on appeal.—*Van Bibber v. Fields*, 527.

TRESPASSERS ON RAILROAD TRACK.

1. RAILROAD COMPANIES—NEGLIGENCE—TRESPASSERS ON TRACK.—The mere fact that persons have frequently trespassed upon a railroad track, and that the company has resorted to no means to stop such trespassers, does not amount to a permission or license to use the track as a footpath.—*Ward v. Southern Pacific Co.* 433.
2. *Idem*.—A railroad company owes to a trespasser upon its track no legal duty to keep a lookout or guard him against danger.—*Ward v. Southern Pacific Co.* 433.
3. *Idem*.—The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck.—*Ward v. Southern Pacific Co.* 433.

TRIAL BY THE COURT.

1. TRIAL BY THE COURT—FINDINGS OF FACT ON MATERIAL ISSUES.—The law is well settled in Oregon that in an action tried by the court without the intervention of a jury, findings must be made on all the material issues.—*Jamson v. Coldwell*, 199.

TRIBUTARIES.

APPROPRIATION OF TRIBUTARIES.—An appropriation of the waters of a stream to a beneficial use is an appropriation of its tributaries.—*Low v. Esser*, 551.

TROVER.

1. CONVERSION BY COTENANT—TROVER.—Where one tenant in common claims the exclusive ownership, and applies the joint property to his own exclusive use, there is such a conversion as will enable his cotenant to bring trover against him.—*Rosenau v. Syring*, 386.
2. TROVER—DEMAND BEFORE SUIT—PLEADING TITLE IN DEFENDANT.—Where defendant denies plaintiff's title, and pleads ownership and right to the possession in himself or another, he cannot defeat recovery on the ground that plaintiff did not allege and prove demand before suit.—*Rosenau v. Syring*, 386.
3. TROVER BY TENANT AGAINST LANDLORD.—Where, during the term of a lease, the landlord enters and takes possession of the premises, and converts to his own use removable trade fixtures erected by the tenant for use in his business, the tenant may bring trover against the landlord unless he has surrendered the premises and abandoned the term.—*Rosenau v. Syring*, 386.

TRUSTS.

1. RESULTING TRUST—STATUTE OF LIMITATIONS.—The statute of limitations does not begin to run against an action to establish a resulting trust in lands until the *cestui que trust* in possession has been ousted.—*Snider v. Johnson*, 323.
2. PAROL EVIDENCE TO ESTABLISH A RESULTING TRUST.—Parol evidence is admissible to establish a resulting trust in land in favor of one paying the purchase price therefor, where another takes the legal title, notwithstanding a recital in the deed that the consideration was paid by the grantee, but the evidence of it must be clear and convincing, and if attended by doubt and uncertainty the writing must remain the highest and best evidence.—*Snider v. Johnson*, 323.
3. EVIDENCE OF RESULTING TRUST.—Where the testimony was conflicting as to whether land was bought with a mother's or her son's money, whether the bond for a deed was taken in her name for herself or to protect his interests as a minor, and whether she directed the deed to be made to him or to her, and the evidence showed that at her request the bond for a deed was never recorded, that the deed was made to the son, and that she delayed over twenty years before she demanded a deed to herself in accordance with his bond, a trust on behalf of the mother is not established.—*Snider v. Johnson*, 323.

TRUST FUND Doctrine as applied to the Assets of Insolvent Corporations. See CORPORATIONS, 2.

USER.

DEDICATION OF STREET—INTENTION—USER.—A dedication of land to public use rests entirely on the intent or assent of the owner, and when the evidence of it rests in parol it must be of such a deliberate and decisive character as to leave no doubt of the owner's intention.—*Levitt v. City of Portland*, 133.

VARIANCE.

FALSE PRETENSES—VARIANCE.—A note for eighty dollars, bearing indorsements showing the payment of forty-three dollars, is admissible in evidence on a trial for obtaining money under false pretenses, where the indictment

VARIANCE—CONCLUDED.

alleges that the defendant falsely represented that a certain written and printed paper, with certain writing thereon signed by the defendant, was a valid promissory note for the payment of thirty-seven dollars, and it is shown that the defendant represented that the sum of thirty-seven dollars was due thereon, and that he indorsed on its back a guaranty of its payment, since the indictment charges that the note was valid for the payment of thirty-seven dollars, and not that the note itself was for that amount.—*State v. Bloodworth*, 84.

VENDOR AND PURCHASER.

VENDOR AND PURCHASER—FORFEITURE OF REAL ESTATE CONTRACT.—Where a contract for the sale of land provides that in case of default in paying any installment of the price therein provided for it shall be optional with the vendor to declare the contract cancelled and the amount paid thereon forfeited, the vendor does not forfeit the vendee's money or cancel the contract by conveying the land to a third person, when this person takes the conveyance and pays the balance due on the bond to the use and benefit of the original vendee—the transaction amounts only to a transfer of the vendor's rights. The result of a transfer by the vendor to a disinterested party after condition broken, is referred to but not decided.—*Gray v. Perry*, 1.

VESSELS.

Jurisdiction of State Courts to Create and Enforce Maritime Liens. See ADMIRALTY.

VESTED RIGHTS.**VESTED RIGHTS IN WHARVES ON NAVIGABLE STREAMS—CONSTITUTIONAL LAW.**

Riparian owners who have built wharves out to the navigable waters of fresh-water streams, with the implied license and permission of the state, and within the spirit and intent of section 4227, Hill's Code, giving to upland proprietors on navigable streams, and within the limits of any incorporated city, the right to build wharves in front of their holdings out to navigable water, have acquired vested rights in such wharf properties that cannot be taken for public use without compensation.—*Lewis v. City of Portland*, 135.

WAREHOUSE RECEIPTS.

1. **WAREHOUSE RECEIPTS—INDICTMENT UNDER SECTIONS 4201 AND 4207, HILL'S CODE.**—Section 4201, Hill's Code, makes it "the duty of every person owning, controlling, managing, or operating a warehouse or other place where grain * * * or other product or commodity is stored," to deliver a receipt correctly stating the quantity received, and section 4207 provides a penalty for violating section 4201. An indictment charged that the defendant was engaged in keeping, controlling, operating, and managing as owner, a warehouse, and was doing business as a warehouseman, and alleged that, being such warehouseman, he feloniously and unlawfully issued and delivered to the owner of certain pelts a receipt for a greater number of sheepskins than he had in store. *Held*, that the indictment was defective because it could not be determined therefrom whether the warehouse in question was one of those mentioned in the statute, and this notwithstanding it appears on the face of the indictment that the defendant kept, managed, and operated the warehouse in which the sheepskins in question were stored.—*State v. Kosland*, 178.
2. **NEGOTIABILITY OF WAREHOUSE RECEIPTS—CODE, § 4201.**—The warehouse receipts required by section 4201, Hill's Code, to be given for commodities stored in warehouses are negotiable regardless of their form.—*State v. Kosland*, 178.

WATERS AND WATER RIGHTS.

1. **INJUNCTION TO RESTRAIN ERECTION OF DAM—OVERFLOW OF WATERS.**—The construction of a dam will not be enjoined on the ground that it will cause

WATERS AND WATER RIGHTS—CONCLUDED.

the water to overflow the banks of the river and flood plaintiff's land, unless it is shown that in consequence of the existence of the dam, lands belonging to plaintiff will be submerged which would not otherwise be.—*Essex v. Wattier*, 7.

2. **WATERS—PAROL LICENSE—REVOCATION.**—A parol license to divert a certain quantity of water for irrigating purposes is not revocable by the licensor after the licensee has expended his money and labor in digging a ditch and preparing his land for the use of the water upon the faith of such parol license; and the grantee of the riparian owner having notice of such license takes subject to it.—*McBroom v. Thompson*, 559.
3. **IRRIGATION—HOW THE RIGHT OF APPROPRIATION IS DETERMINED.**—The right of appropriation is determined by the use made of the water, and not by the amount diverted onto the land, and will be limited to the amount used within a reasonable time for some useful industry.—*Low v. Eisor*, 551.
4. **APPROPRIATION OF TRIBUTARIES.**—An appropriation of the waters of a stream to a beneficial use is an appropriation of its tributaries.—*Low v. Eisor*, 551.
5. **IRRIGATION—RIGHT TO INCREASE APPROPRIATION.**—A prior appropriator of water is entitled to a sufficient quantity to irrigate his land, and he may increase the appropriation to keep pace with the additional area brought under cultivation, if it is done with reasonable diligence; but where he fails for a number of years to increase the cultivated area, he cannot then increase the appropriation to the injury of appropriators whose rights have accrued in the mean time.—*Low v. Eisor*, 551.
6. **ESTOPPEL—IRRIGATION—PERMITTING IMPROVEMENTS TO BE MADE WITHOUT OBJECTION.**—Where, for a series of years, riparian owners and their grantors have acquiesced in the diversion of a part of a stream by a person who is not a riparian owner, and such person has yearly aided in keeping the channel of the stream open, and expended money on his farm, which would be worthless without the water, a court of equity will not enjoin a further diversion of the water at the suit of such riparian owners.—*McBroom v. Thompson*, 559.

See also **TIDE LANDS—RIPARIAN PROPRIETORS—WHARF RIGHTS.**

WHARF RIGHTS.

1. **WHARF RIGHTS OF RIPARIAN PROPRIETORS ON NAVIGABLE STREAMS.**—In view of the history of legislation on the subject of tide lands in this state, and in view also of the fact that the custom has always prevailed here for riparian owners to build wharves in front of their upland holdings out to navigable water, and that the tendency of our courts has been to recognize in riparian owners on the navigable rivers rights in submerged lands that do not belong to the public generally, the court feels justified in holding that riparian proprietors on the navigable rivers of the state who have built wharves out to navigable water in front of their upland have rights of private property therein that cannot be taken for public use except after due compensation being made therefor in the manner established by law.—*Lewis v. City of Portland*, 134.
2. **RIPARIAN PROPRIETORS—WHARF RIGHTS UNDER SECTION 4227, HILL'S CODE—CONSTITUTIONAL LAW.**—The object of section 4227, Hill's Code, which authorizes the owners of land lying upon navigable streams, and within the limits of incorporated cities to construct wharves thereon, and extend them out to navigable water, being to encourage the building of wharves in aid of navigation and commerce, riparian owners on navigable streams, who, before the passage of the section, had built wharves on such upland, acquired, within the spirit and intent of said section, property in such wharves which cannot be taken for public use without just compensation.—*Lewis v. City of Portland*, 135.

WHARF RIGHTS—CONCLUDED.

2. **VESTED RIGHTS IN WHARVES ON NAVIGABLE STREAMS—CONSTITUTIONAL LAW.**—Riparian owners who have built wharves out to the navigable waters of fresh-water streams, with the implied license and permission of the state, and within the spirit and intent of section 4227, Hill's Code, giving to upland proprietors on navigable streams, and within the limits of any incorporated city, the right to build wharves in front of their holdings out to navigable water, have acquired vested rights in such wharf properties that cannot be taken for public use without compensation.—*Lewis v. City of Portland*, 185.

WIDOW DOWER is not affected by an administrators sale under section 1153, Hill's Code.—*Whiteaker v. Bell*, 490.

WITNESSES.

1. **WHAT IS A WITNESS'S TESTIMONY.**—The testimony of a witness is not only his evidence in chief, but is that evidence as explained, modified, limited, or contradicted by the cross-examination; both the direct and cross-examination must be treated as evidence given on behalf of the party calling the witness.—*Ah Doon v. Smith*, 89.
2. **CROSS-EXAMINATION—WITNESSES—CODE, § 887.**—The right of cross-examination is a substantial and important one, and though its proper application rests primarily in the discretion of the trial court, that discretion will be reviewed in some cases. In practice a wide latitude should be allowed the adverse party in order that all the facts within the knowledge of the witness may be disclosed in their proper proportions and relations. Thus in an action to recover money alleged to have been collected by defendant as plaintiff's agent, where defendant alleges that he paid a designated amount to plaintiff through her husband, out of which plaintiff's claims should be satisfied, and the husband has testified in rebuttal that the money so paid was due him on account of a partnership existing between himself and defendant, and collections made by defendant as receiver and otherwise on accounts due him and another as partners, he may properly be cross-examined as to the nature and business of such partnership, and as to the collections and the receivership.—*Sayers v. Allen*, 211.
3. **EVIDENCE OF REPUTATION OF WITNESS.**—It is not competent to show the reputation of a witness for truth and veracity unless such reputation has been attacked.—*Osmun v. Winters*, 260.

WRIT OF REVIEW.

WRIT OF REVIEW—EVIDENCE.—A writ of review does not bring up questions as to the admissibility of evidence, but only questions as to jurisdiction, and as to the correctness of the judgment on the ultimate facts appearing in the record.—*Smith v. City of Portland*, 297.

WRITTEN INSTRUMENTS. Power of Equity to Reform. See EQUITY, 2.

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